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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

**LAND AND LAKES COMPANY,
an Illinois Corporation, and
STONY ISLAND RECLAMATION CO.,
an Illinois Corporation,**

Petitioners,

v.

**HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and
THE CITY OF CHICAGO, a Municipal Corporation,**

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Substantive Due Process Clause of the Fourteenth Amendment guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law." The trial court found that the Petitioners' substantive due process rights had been violated when the Respondents denied Petitioners an operating permit on a 27-acre portion of their 80-acre sanitary landfill facility, based on a section of the Chicago Environmental Protection and Control Ordinance (commonly known as the landfill moratorium ordinance). The First District Illinois Appellate Court reversed, holding that the Respondents did not violate the Petitioners' due process rights where the landfill moratorium ordinance was "rationally related" to the underlying legislative objectives. In applying the "rational relation" test, the Illinois Appellate Court ignored certain Supreme Court precedent which suggests that in property cases, an ordinance or regulation violates the Due Process Clause unless it bears at least a "substantial relation" to the underlying legislative objectives. The Appellate Court erred further when it applied the "rational relation" test and found that the Respondents had met that standard despite the undisputed fact that the Petitioners' use of the property was consistent with the public health, safety and welfare.

The questions presented for review are:

Whether, in property cases, a challenged governmental regulation or ordinance must bear a "substantial relation" to the underlying legislative objectives, or must "substantially advance" those objectives, in connection with a substantive due process challenge; or, whether the

challenged regulation or ordinance must bear only a "rational relation" to the underlying legislative objectives.

If "rational relation" is the governing test, whether the Illinois Appellate Court erred in its application of that test to the Petitioners' property. If "substantially advance" or "substantial relation" is the governing test, whether the City of Chicago's landfill moratorium ordinance substantially advances or is substantially related to its underlying legislative objectives.

STATEMENT PURSUANT TO RULE 29.6

Land and Lakes Company and Stony Island Reclamation Company have no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Land and Lakes Company and Stony Island Reclamation Company, respectfully petition for a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court for the First District in this case.

OPINIONS BELOW

The opinion of the Illinois Appellate Court for the First District is reprinted with the court's order in the Appendix hereto at pages A1 to A30. The opinion and order of the Circuit Court of Cook County is reprinted in the Appendix at pages A31 to A52. The Appellate Court's April 7, 1997 Order denying the Petitioners' petition for rehearing is reprinted in the Appendix at pages A53 to A54. The October 1, 1997 Letter from the Illinois Supreme Court to Mr. John F. Kennedy denying the Petitioners' petition for leave to appeal also is reprinted in the Appendix at page A55.

JURISDICTION

The Illinois Supreme Court denied the Petitioners' petition for leave to appeal on October 1, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

ORDINANCE INVOLVED

On or about February 24, 1984, the City of Chicago passed an amendment to its Environmental Protection and Control Ordinance, which purported to establish a moratorium on the creation of sanitary landfills and on the "expansion" of existing landfills located within the City of Chicago until after August 1, 1988. The moratorium amendment has been renewed from time to time over the last thirteen years and provides as follows:

> (1) No permit shall be issued nor modification of any permit allowed for the expansion of any existing sanitary landfill or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal, and
>
> (2) No permit shall be issued for the creation or operation of a new sanitary landfill site or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal.

Title 11, City of Chicago Municipal Code, Section 11-4-1520(F).

Under the Environmental Protection and Control Ordinance of the City of Chicago, a sanitary landfill is defined as follows:

> A facility originally permitted under this chapter and operating prior to January 1, 1985, and permitted by the Illinois Environmental Protection Agency for the disposal of waste on land without creating nuisances or hazards to public health.

Title 11, City of Chicago Municipal Code, Section 11-4-120.

STATEMENT OF THE CASE

A. Overview

The City of Chicago violated the Petitioners' substantive due process rights by applying its landfill moratorium ordinance to the Petitioners' property without any valid legislative purpose and despite the Petitioners' having proper zoning, a special use variance and all required state and federal permits, including Illinois Environmental Protection Agency permits. The City of Chicago contended that Petitioners could not operate the landfill facility without a City permit and that the moratorium ordinance prohibited the City of Chicago from issuing the subject permit. The trial court recognized that the use of Petitioners' property as a landfill facility was *protective* of the public health, safety or welfare, and consequently that the application of the City's landfill moratorium ordinance to the Petitioners' property violated the Petitioners' due process rights. Without overruling any of the relevant factual findings of the trial court, the Illinois Appellate Court reversed the trial court using a "rational relation" test to review the City's property regulation, in contravention of Supreme Court precedent which dictates a "substantially advance" or a "substantial relation" test. The Appellate Court further erred in its application of the "rational relation" test, finding a rationale for application of the ordinance where none exists.

In using the "rational relation" test, the Appellate Court cited Seventh Circuit precedent. The Circuits, however, are seriously divided on whether it is proper to use a "rational relation" test in property cases involving substantive due process claims, or whether a higher

"substantially advance" or "substantial relation" test is required. Currently the Circuit Courts are applying both standards, with contrary results. This tension in the case law leaves little, if any, predictability in outcomes, and makes it difficult for courts, like the Illinois Appellate Court in this instance, to properly analyze a land owners' due process claim. As a result, land owners like the Petitioners may end up losing the use of their land to a governmental regulation or ordinance where there is no valid legislative purpose. This case presents an opportunity for the Court to clarify the appropriate standard of review and to bring more stability to land owner expectations.

B. Factual Background

The 122nd Street Facility

Land and Lakes has been in business for over 30 years as an Illinois corporation engaged in the waste management and recycling business in the Chicago area. Land and Lakes operates an 80-acre sanitary landfill located at 122nd Street and Stony Island ("122nd Street Facility") in Chicago, Illinois. Stony Island Reclamation Company owns the land and leases it to Land and Lakes. Both Land and Lakes and Stony Island are owned and operated by the same family.

The 122nd Street Facility is a non-hazardous waste facility situated on the City's southeast side, in an area which is heavily industrial, and comprised primarily of waste disposal facilities. The 122nd Street Facility is substantially removed from any residential areas and was, at all relevant times, an operating landfill permit-

ted under the strictest applicable state and federal environmental laws and regulations.

In 1977, the City of Chicago's ("City") Zoning Board of Appeals ("ZBA") granted Land and Lakes' application for a special use variance to operate 53 acres of the 122nd Street Facility as a sanitary landfill. The remaining 27 acres of the 122nd Street Facility were originally zoned as M3-3 heavy manufacturing. On or about September 20, 1982, Land and Lakes applied to the ZBA for a variance to operate a sanitary landfill on the remaining contiguous 27 acres of its property as a sanitary landfill. The ZBA approved the application, finding that Land and Lakes' proposed use of the 27 acres as a sanitary landfill would benefit the City in a variety of ways, including that it would serve the continuing public need for sanitary landfills, that it would complement land usage in the area, that the proposed use would eliminate the public health nuisances that had previously prevailed at the site before Petitioners purchased the facility, and that operation of a sanitary landfill would protect the public health, safety and welfare. Based on these findings, on October 15, 1982, the City's ZBA issued a special use variance for the remaining 27-acre parcel as a sanitary landfill. This special use variance remains in full force and effect.

In reliance on the special use variance, Land and Lakes proceeded to develop the 27 acres for operation as part of its sanitary landfill, at considerable expense. Land and Lakes spent over $1.5 million preparing the 27 acres for operation and since the trial court's ruling, Land an Lakes has spent an additional amount exceeding $4 million to improve the facility for ongoing operations consistent with the trial court's ruling.

The Moratorium

In 1984, two years after the City's ZBA issued Land and Lakes the Special Use Variance to operate a sanitary landfill on the entire 80-acre parcel, the City first passed its moratorium ordinance to ban the creation of new landfills or the "expansion" of existing landfills located within the City of Chicago's borders. Significantly, the City failed to define the term "expansion" in the ordinance. Equally important, despite a mandate from the City Council, the Commissioner of the City's Department of the Environment failed to promulgate any rules or regulations relating to the moratorium ordinance generally or the term "expansion."[1] The moratorium ordinance has been renewed from time to time since 1984 and continues to be in effect today.

Land and Lakes' IEPA Permits

On September 29, 1987, the Illinois Environmental Protection Agency ("IEPA") issued Land and Lakes a supplemental permit which authorized development of the entire 122nd Street Facility as a sanitary landfill, including the 27-acre parcel at issue in this case. The City also received written notice in July 1993 that Land and Lakes had applied to the IEPA for an operating

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[1] Pursuant to Section 2-30-030 of the City of Chicago Municipal Code, Respondent Henderson is charged with the responsibility of issuing rules and regulations interpreting and clarifying the requirements of Chapter 11-4 of the Municipal Code (including the landfill moratorium ordinance). Without these rules and regulations, it is impossible for anyone to operate under the moratorium ordinance. This incomplete legislative process further violates the Petitioners' due process rights.

permit to conduct landfilling operations within the 27 acres. On October 1, 1993, without objection from the City, the IEPA issued Land and Lakes a supplemental operating permit which authorized actual landfill operation on the 27-acre parcel in accordance with the Petitioners' September 27, 1987 IEPA developmental permit. The IEPA permit issued to Land and Lakes for the 122nd Street Facility remains in full force and effect.

The City's Permit Denial

The Municipal Code of Chicago requires that an operator obtain a permit prior to operating a sanitary landfill within the City of Chicago. On March 7, 1994, Respondent Henderson notified Land and Lakes that the City had denied the Petitioners' application for an operating permit for the 27-acre parcel solely on the basis of the landfill moratorium ordinance. On March 8, 1994, the Petitioners filed their Verified Complaint against the Respondents in the trial court, challenging the moratorium ordinance on several bases, including substantive due process grounds.

C. Proceedings Below

The Trial Court Ordered Immediate Issuance of an Operating Permit

Based on the Petitioners' Verified Complaint and following a trial on the merits, the trial court permanently enjoined the Respondents from applying the moratorium ordinance, and ordered that the City issue Petitioners a permit to operate the entire 122nd Street Facility, including the 27-acre portion in question. App. at p. A51.

This finding was based on, *inter alia*, Petitioners' claim that the moratorium ordinance violated the Petitioners' due process rights under the Fourteenth Amendment. App. at p. A51. The trial court specifically held that granting the permanent injunction would not harm the public interest in a clean and safe environment. App. at p. A46.

The Appellate Court Reversed Using a "Rational Relation" Test

The Respondents appealed the trial court's order, and on December 31, 1996, the Appellate Court reversed the trial court's ruling. Specifically, the Appellate Court analyzed the Petitioners' substantive due process claim under a "rational relation" test, and found that the Respondents had met that test. App. at pp. A17-A18. In its analysis, the Appellate Court ignored United States Supreme Court precedent which applied a "substantially advance" or a "substantial relation" test; and instead, cited *Pro-Eco, Inc. v. Board of Commissioners*, 57 F.3d 505, 514 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 672 (1995), in applying a "rational relation" test. App. at p. A17. The Appellate Court further held that the moratorium ordinance was rationally related to protecting the public health and welfare, despite the uncontroverted findings of the trial court to the contrary. App. at p. A18.

REASONS FOR GRANTING THE PETITION

This Court's decisions in *Nectow v. Cambridge*, 277 U.S. 183 (1928) and *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), set forth a heightened level of scrutiny for property regulations challenged under the Due Process Clause of the Fourteenth Amendment. *Nectow* and *Euclid* dictate that the application of a challenged ordinance or law to a particular property violates due process if it does not "substantially advance" legitimate state interests.[2] For example, the Court affirmed that this concept of enhanced scrutiny was applicable in a takings case under the Fifth Amendment—*Agins v. City of Tiburon*, 447 U.S. 255 (1980) (citing both *Nectow* and *Euclid*).

Despite these cases, however, the Illinois Appellate Court applied a "rational relation" test to the Petitioners' due process claims and found that the Respondents had met that test, despite the uncontroverted trial court findings that the Petitioners had proper zoning, a special use variance, and all state and federal permits (including IEPA permits), and that the use of the Petitioners' property did not harm the public health, safety and welfare. The Appellate Court cited *Pro-Eco, Inc. v. Board of Commissioners*, 57 F.3d 505 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 672 (1995), which recognized *Euclid* for the "substantial relation" language, but analyzed a substantive due process claim using a "rational basis" test.

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[2] Courts have recognized that the "substantial relation" test provides a higher standard in property regulation. *See, e.g., Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810, 827 (4th Cir. 1995) ("rational basis" test is narrower scope of protection than "substantial relation" test).

Other Circuits have actively chosen to use either the "substantial relation" language of *Euclid* or the "substantially advance" language of *Agins* as their due process test in property cases, while some Circuits continue to apply a "rational relation" test.[3] The split in the Circuits is exacerbated by the fact that several of the Circuits cite to one test (or another) in their analysis, but apply a wholly different test in resolving the substantive due process claims.

The split in the Circuits affects landowners throughout the country. This case provides an opportunity to clarify the confusion among the Circuits as to the proper standard to be used in property cases; that is, whether a challenged governmental regulation or ordinance must "substantially advance" or bear a "substantial relation" to the underlying legislative objectives in connection with a substantive due process challenge; or, whether the challenged regulation or ordinance must bear only a "rational relation" to the underlying legislative objectives.[4]

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[3] The "substantial relation" test and the "substantially advance" test are examples of the tests illustrating the heightened level of scrutiny afforded substantive due process claims.

[4] Determination by this Court of the appropriate standard has become more imperative given this Court's recent decision in *City of Chicago v. International College of Surgeons*, 1997 WL 764505 (Dec. 15, 1997 U.S.S.Ct.). Moreover, once a standard for property regulation challenged under the Due Process Clause is articulated in this Court, criteria under that standard should be set forth by which the regulation is examined.

I.

HEIGHTENED JUDICIAL SCRUTINY IN PROPERTY CASES

The Supreme Court of the United States in *Nectow v. Cambridge*, 277 U.S. 183 (1928), applied a higher level of scrutiny for property cases challenging a governmental regulation or ordinance under a substantive due process challenge. The petitioner in *Nectow* claimed that a zoning ordinance, as specifically applied to the petitioner's piece of property, deprived him of his property without due process of law in contravention of the Fourteenth Amendment. The *Nectow* Court examined the substantive due process claim, and held that:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a *substantial relation* to the public health, safety, morals, or general welfare. *Euclid v. Ambler Co., supra*, p. 395 (47 S.Ct. 114).

Nectow, 277 U.S. at 188.

Similarly, a zoning ordinance in *Euclid*, 272 U.S. 365 (1926) (cited in *Nectow*), was "assailed on the grounds that it [was] in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprive[d] appellee of liberty and property without due process of law. . . ." *Id.* at 384. *Euclid* also applied a heightened level of scrutiny to its due process analysis, holding that an ordinance was arbitrary and unreasonable, and therefore unconstitutional if it had no "substantial relation" to the public health, safety, morale, or general welfare. 272 U.S. at 395 (citations omitted). The

Supreme Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), confirmed this heightened test in the takings context, and may even have increased the level of scrutiny. Specifically, the *Agins* Court stated:

> The application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631 (1978) (emphasis added).

Agins, 438 U.S. at 260.

Thus, under the rule and rationale of *Agins, Nectow* and *Euclid*, a property ordinance must "substantially advance" legitimate state interests. In applying *Nectow*, the Court turned the static "substantial relation" test into a more dynamic test, in which the challenged regulation or ordinance must actually promote or "advance" the legitimate state interest. If it does not pass this heightened level of scrutiny, the law or ordinance constitutes a taking in violation of the Fifth Amendment.

II.

THE CONTROVERSY OVER THE PROPER LEVEL OF JUDICIAL SCRUTINY FOR SUBSTANTIVE DUE PROCESS CHALLENGES INVOLVING PROPERTY REGULATION

A. Background to the Controversy

The controversy over the proper level of judicial scrutiny for substantive due process challenges involving the

regulation of property arises from the different standards applied to the regulation of property in the context of takings, due process and equal protection. Subsequent to this Court's holding in *Agins*, the Supreme Court highlighted what it perceived to be a difference between these standards, as follows:

> there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. . . . *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

Nollan v. California Coastal Commission, 483 U.S. 825, 834, n. 3 (1987). *Nollan*, however, does not clarify the different standards, nor do the "formulations in [this Court's] later cases" clarify the different standard.

Precedent suggests that the split among these different standards would align takings/due process challenges with the "substantially advance" or "substantial relation" test, and equal protection challenges with the "rational relation" test. *Agins*—a takings case—relies on due process cases for its "substantially advance" test. Moreover, as far back as *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), substantive due process cases have provided the foundation for takings jurisprudence. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994). Thus, it is logical that the higher standard of the "substantially advance" or "substantial relation" test should have equal

application in both areas.[5] Meanwhile, the "rational relation" test has been firmly established for property regulation examined pursuant to the equal protection clause. *See, e.g., Hodel v. Indiana*, 452 U.S. 314 (1981).

The Circuits, though, have not been able to discern the Supreme Court's intentions with respect to the different standards of review, especially in the due process area. Conflicting decisions involving property and substantive due process claims have caused at least one Circuit Court to state: "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable . . . **We wish it were in our power to harmonize these decisions, but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.**" *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1219, n. 45 (1992) (emphasis added). This case presents the opportunity for the Supreme Court to bring harmony to the inherently inconsistent standards currently applied by the Circuits and the lower courts.

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[5] Further, several Supreme Court cases have suggested that an action which passes a due process review also should pass a takings review, thereby implying that the heightened "substantial relation" or even the "substantially advance" test must apply to both types of challenges. For example, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the Supreme Court stated, "Given that [the petitioner's] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violates the Takings Clause." *Id.* at 640 (*quoting Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) (surprising if actions which passed due process review were unconstitutional takings)).

B. The "Substantially Advance" or "Substantial Relation" Test

As set forth above, the Supreme Court has applied at least a "substantial relation" test to due process claims involving property regulation. *Nectow v. Cambridge*, 277 U.S. 183 (1928); *Euclid v. Ambler*, 272 U.S. 365 (1926). The heightened test has been reaffirmed by this Court in cases such as *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84-85 (1980) (*citing Nebbia v. New York*, 291 U.S. 502 (1934); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)). The Supreme Court also has cited *Nectow* and *Euclid* in the takings area in *Agins v. City of Tiburon*, 447 U.S. 254 (1980) and *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).

Several Circuits have used the "substantial relation" test, and some the "substantially advance" test, for their analysis of substantive due process claims involving property regulation. *See, e.g., Doherty v. City of Chicago*, 75 F.3d 318 (7th Cir. 1997) (noting that the Supreme Court has failed to provide guidance on the issue, the court cites the "substantial relation" language but finds that the plaintiff failed to provide the necessary factual grounds for a substantive due process claim); *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997); *Messiah Baptist Church v. County of Jefferson, State of Colorado*, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989). The First Circuit, in *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990), noted:

> The test to be applied in considering substantive due process challenges to a land use ordinance was established early on: "a court should not set aside the determination of public officers in [zoning] matter[s] unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having *no substantial relation* to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow v. Cambridge*, 277 U.S. 183, 187-188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926). The appropriateness of this test has been reaffirmed on numerous occasions in more recent decisions. *See, e.g., . . . Crow-New Jersey 32 Ltd. Partnership v. Township of Clinton*, 718 F.Supp. 378, 384 (D.N.J. 1989) ("A land use regulation violates the Due Process Clause of the Fourteenth Amendment if it does not substantially advance legitimate governmental interests.")

Smithfield, 907 F.2d at 243-44 (emphasis added).[6]

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[6] Nevertheless, *Smithfield* also stated: "A land-use regulation will thus stand if a rational relationship exists between it and a legitimate governmental objective." This language has been quoted in more recent First Circuit decisions. *See Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1991). *Smithfield* is not the only case which confuses the "substantially advance," the "substantial relation" and the "rational relation" tests, highlighting even more the confusion in application of these standards among the Circuits.

C. The "Rational Relation" Test

Despite this Court's application of the "substantially advance" and the "substantial relation" tests, some Circuit Courts continue to apply a "rational relation" test to due process claims involving property regulation. *See, e.g., Villas of Lake Jackson v. Leon County*, 121 F.3d 610 (11th Cir. 1997);[7] *WMX Technologies, Inc. v. Gasconade County, Missouri*, 105 F.3d 1195 (8th Cir. 1997); *Texas Manufactured Housing Assoc., Inc. v. Nederland*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2497 (1997); *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 598 (3d Cir. 1995) (noting that the court's substantive due process inquiry was "rendered even more difficult by the paucity of Supreme Court guidance."), *cert. denied*, 116 S.Ct. 352 (1995); *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989); *Doe v. City of Butler, Pennsylvania*, 892 F.2d 315 (3d Cir. 1989).

Many of these Circuits have expressly cited or quoted *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) as the precedent they rely upon for choosing this standard. *See, e.g., Pearson*, 961 F.2d at 1223; *Geo-Tech*, 886 F.2d at 666; *Doe*, 892 F.2d at 318. In dicta, the *Schad* Court stated as follows:

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[7] Note that there is even an internally inconsistent application in the correct standard for due process claims involving property regulation in that the Eleventh Circuit has recently applied both the "substantial relation" and the "rational relation" tests in two different cases. *Compare Villas of Lake Jackson v. Leon County*, 121 F.3d 610 (11th Cir. 1997) with *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997).

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is *rationally related* to legitimate state concerns and does not deprive the owner of economically viable use of his property.

Id., 452 U.S. at 68 (citations omitted; emphasis added). The confusion among the Circuits is compounded because *Schad* cites *Agins*, *Euclid*, and *Nectow* as authority for the "rational relation" test, even though all three cases expressly use the "substantially advance" or the "substantial relation" test.

Still other cases confuse the "substantial relation" and the "rational relation" test, borrowing terms from both standards, but eventually relying on the more lenient "rational relation" test. *See, e.g., Pro-Eco, Inc. v. Board of Commissioners*, 57 F.3d 505 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 672 (citing *Euclid* for the "substantial relation" language, but using a "rational basis" test); *Orange Lake Associates, Inc. v. Kirkpatrick*, 21 F.3d 1214 (2d Cir. 1994) (applying "rational relationship" test despite citation to *Euclid*); *Pearson*, 961 F.2d 1211 (using terms of both the "substantial" and "rational" tests); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990) (mixing the concepts of the "substantial relation" test, the "substantially advance" test, and the "rational relation" test).[8]

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[8] In *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989), the court stated: "The relevant question for consideration [in this substantive due process challenge to the city's refusal to rezone certain property at Greenbriar's re-

(continued...)

Panels of the Fourth Circuit have employed both the "substantial relation" test (*see First Assembly of God, Alexandria, Virginia v. City of Alexandria, Virginia*, 739 F.2d 942 (4th Cir. 1984), *cert. denied*, 469 U.S. 1019 (1984)) and the "rational relation" test (*Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989)). A Fourth Circuit panel recently confronted the issue again in *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995). *Sylvia Development* cited both *Nectow* and *Euclid* and their "substantial relation" test, but the Fourth Circuit panel concluded:

> In more recent decisions, the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning. See *Village*

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[8] (...continued)
quest] is whether there existed a rational basis for the City's rejection of Greenbriar's plan, or phrased in the alternative, whether the City's action bore no substantial relation to the general welfare." Thus, there may be another emerging theory on the proper test to be applied in that a property regulation has no "rational basis" if it is not "substantially related" to the general welfare. In essence the *Greenbriar* court is using a heightened standard to define when government regulations are in fact "rational." Additional divergence among the Circuits can be seen in recent decisions which do not discuss either a "substantial relation" or a "rational relation" test but only contemplate whether the state action is "conscience-shocking" or "genuinely drastic." *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997); *Licari v. Feruzzi*, 22 F.3d 344 (1st Cir. 1994).

> *of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d. 797 (1974).

Id. at 827. The basis for the Fourth Circuit's newest decision—*Village of Belle Terre*—is an equal protection case which did not involve a due process challenge. See *Village of Belle Terre*, 416 U.S. at 8. The Second, Third, and Sixth Circuits also have cited *Belle Terre* as precedent to use the "rational relation" test in analyzing substantive due process challenges. See *Orange Lake*, 21 F.3d at 1225; *Pearson*, 961 F.2d at 1223; *Doe*, 892 F.2d at 318.[9] *See also Norton v. Village of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996) (*citing Sylvia Development*'s "recent narrowing" theory and applying a "rational relation" test).

Justice Scalia recently criticized the Court's use of the "rational relation" test in the property regulation and due process area. Noting that the due process clause explicitly applies to "property," Justice Scalia questioned the "categorical and inexplicable exclusion" of so-called "economic rights" from the heightened level of scrutiny applied to fundamental rights, reasoning that such exclusion unquestionably involves policy making rather than neutral legal analysis. *United States v. Carlton*, 512 U.S. 26, 42-43 (1994) (Scalia, J. concurring). Justice Scalia's concurrence reasons that since the Court has awarded heightened protection under substantive due process to many rights unenumerated in the Constitution, it should follow that due process also grants additional protection to the expressed due process right of property. *Id.*

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[9] Thus, the confusion among the Circuits as to the appropriate standard expands beyond the due process realm and into both the takings and equal protection areas.

D. The Preemption Theory

Recently, a third theory regarding substantive due process review and property cases has emerged in the Ninth Circuit. In an *en banc* decision, *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the Ninth Circuit held that substantive due process property claims were preempted by the Fifth Amendment, which expressly addresses the property area under the Takings Clause. The *Armendariz* court concluded, "Substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* at 1325-26. In one of its footnotes, the *Armendariz* Court acknowledged:

> One might be tempted by the more than a century's worth of law holding that 'private takings' violate the Constitution to treat the right against 'private takings' as a substantive due process right. . . . This substantive reading of the Due Process Clause would perhaps present fewer concerns . . . given the long history of the right against 'private takings' and the certainty that the 'property' referred to in the Due Process Clause includes real property.

Id. at 1324 n. 8. *See also Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) (substantive due process claim for denial of permit was preempted by Fifth Amendment), *cert. denied*, 117 S.Ct. 1845 (1997). The Ninth Circuit's recent, apparent abandonment of substantive due process analysis in cases involving the regulation of property has not yet been examined in other circuits.

Given the substantial history and direct application of the due process clause and its explicit protection of prop-

erty rights, Petitioners believe the Ninth Circuit is in direct conflict with *Soldal v. Cook County, Illinois*, 506 U.S. 56 (1992), where the Court held:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984) (Fourth Amendment and Fourteenth Amendment Due Process Clause); *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (Eighth Amendment and Fourteenth Amendment Due Process Clause).

These Ninth Circuit cases also are directly contrary to the majority of Justices of this Court who, in *Albright v. Oliver*, 510 U.S. 266 (1994), analyzed the merits of a due process claim in that case in addition to a takings claim. *See also Pruneyard*, 447 U.S. at 84-85 (separate analysis of takings and due process claims).[10]

III.

THE QUESTIONS PRESENTED ARE IMPORTANT

"[T]he prohibition against the deprivation of property without due process of law reflects the high value,

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[10] If this Court were to grant a writ of certiorari to examine the Ninth Circuit's preemption theory and to eventually agree with the Ninth Circuit, this Court could remand the case to the trial court for a hearing on the Petitioners' pending claim under the takings clause.

embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67 (1972). The purpose of the due process clause is to protect the use and possession of property from arbitrary encroachment (*Fuentes*, 407 U.S. at 81), and the guaranty of due process demands that the law shall not restrict the use of property by means that fail to have a real and substantial relation to the objective sought to be obtained. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84-85 (1980). Accordingly, the level of judicial scrutiny under which property regulations are examined under the Fourteenth Amendment is of monumental importance to landowners throughout the country.

A. If the Illinois Appellate Court Had Applied a "Substantially Advance" or a "Substantial Relation" Test, the Petitioners Would Have Prevailed

The trial court held that Respondents had deprived Petitioners of a protectible property interest under the due process clause through the Respondents' unqualified refusal to allow Petitioners to use their land as allowed under the zoning, special use variance, and federal and state permits. As part of its findings of fact, the trial court held that the Petitioners' activities did not constitute a nuisance and would not harm the public interest in a clean and safe environment. The Illinois Appellate Court reversed, holding that due process was satisfied because the Respondents' action was "rationally related" to the public welfare.

Assuming this Court rejects the Ninth Circuit's preemption analysis, Petitioners believe the difference be-

tween application of the "rational relation" test and the "substantially advance" or "substantial relationship" test would be determinative in this case.[11] Specifically, the City of Chicago's landfill moratorium ordinance does not "substantially advance" or have a "substantial relation" to any recognized public interest as applied to the 122nd Street Facility. The stated purpose for enactment of the moratorium ordinance was "the protection of the public health, safety and welfare . . . pending research and review of the hazards which may be posed by such creation and expansion [of landfills within Chicago]." The underlying record demonstrates, however, that although the City did develop a Solid Waste Management Plan in 1989, that plan was not responsive to pending issues relating to the moratorium. In addition, given the fact that the Petitioners' use of the property as an operating sanitary landfill was found to be protective of the public health, safety and welfare by the zoning board of appeals, the IEPA, and the trial court, the City's Solid Waste Management Plan is not responsive to its stated legislative objectives.

Moreover, the City has never presented any explanation for its now 13-year delay in lifting the moratorium ordinance, nor did it prove any efforts to solve the alleged concerns which the moratorium ordinance was intended to address. In fact, the City's own Solid Waste

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[11] Petitioners believe that the Appellate Court did not have any basis to find even a "rational relation" between the landfill moratorium ordinance and its purported underlying legislative objectives; however, Petitioners believe that had the Illinois Appellate Court applied the more stringent "substantially advance" or "substantial relation" test, it would have upheld the permanent injunction granted by the trial court.

Management Plan indicates that there is a waste disposal crisis in the City of Chicago, as landfill space diminishes, thereby forcing the City to export its waste to landfills located up to 50 miles from the City. In addition, the City of Chicago admits in its Plan that, due to the landfill shortage (caused by the moratorium), the City may have to buy its own landfill or site another regional facility, among other things. The Petitioners' 122nd Street Facility serves the public need and accepted more than 82 million pounds of City waste since October 1993 alone. Moreover, the ZBA findings establish that the 27 acres are a benefit to the City by eliminating uncontrolled skip dumping and providing necessary landfill space. Thus, the evidence at trial clearly demonstrated that the Moratorium did not substantially advance the public health, safety, and welfare as applied to the Petitioners' 122nd Street facility. *See Q.C. Construction Co., Inc. v. Gallo*, 649 F.Supp. 1331, 1336-1337 (D.R.I. 1986) (invalidating municipal building moratorium where municipality was not taking steps to rectify underlying problems giving rise to need for moratorium).

It is clear that the City has, by continuing to renew its landfill moratorium with no underlying justification for its existence, made a policy decision for the *prohibition* against new or expanding landfills in the City of Chicago. Given the prior City and State determinations that the Petitioners' property was properly zoned, permitted by the IEPA, and found to benefit the City and public health and welfare, there can be no valid legislative purpose for preventing the use of the Petitioners' property as a landfill.

B. Harmony in the Lower Courts is Necessary to Prevent Serious and Highly Injurious Results

If this Court intended to hold property regulation to a heightened level of scrutiny under a due process analysis, it should clarify the substantial confusion and inconsistencies which now exist in the case law. The confusion and lack of consistency affects millions of property owners across the nation as well as regulatory agencies, and local, county and state governments. This confusion in the law also could lead to serious and highly injurious results should courts apply the "rational relation" test when a "substantially advance" or a "substantial relation" test should apply. For example, if the Appellate Court was in error in applying a "rational relation" test and no clarification by this Court is made, Petitioners will not be allowed to use their land as zoned and developed under the guise of an unconstitutional ordinance which bears no "substantial relation" to a valid legislative purpose. Petitioners, however, are not the only landowners affected by this Court's decision. This case provides an opportunity for the Court to bring the confusion to a halt, and to bring clarity to the expectations of property owners, zoning regulators and city planners across the country.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Second Division
December 31, 1996

Nos. 1-94-3425 & 1-95-1547 Cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAND AND LAKES COMPANY and STONY ISLAND RECLAMATION COMPANY,

Plaintiffs/Counterdefendants-Appellees,

v.

HENRY L. HENDERSON, Commissioner of the Department of the Environment,

Defendant-Appellant,

and

THE CITY OF CHICAGO,

Defendant/Counterplaintiff-Appellant.

CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION, and THE LAKE MICHIGAN FEDERATION,

Petitioners-Appellants,

v.

LAND AND LAKES COMPANY and STONY ISLAND RECLAMATION COMPANY,

Respondents-Appellees.

Appeal from the Circuit Court of Cook County
No. 94 CH 02093
Honorable Albert Green, Judge Presiding.

ORDER

This case involves the constitutionality of a moratorium ordinance for landfill permits enacted by the Chicago City Council in 1984. Plaintiffs filed a six-count verified complaint against the City of Chicago (the City) and the Commissioner of the Department of Environment seeking a preliminary and permanent injunction that would prohibit defendants from applying the moratorium to plaintiffs and require defendants to issue plaintiffs an operating permit for their entire 79-acre sanitary landfill. Count I of plaintiffs' complaint sought declaratory judgment that the moratorium did not apply to the landfill property; count II sought declaratory relief based on estoppel; count III sought declaratory relief that denial of plaintiff's permit was preempted by the Illinois Environmental Protection Agency (IEPA); count IV alleged a violation of procedural due process; count V alleged a denial of substantive due process; and count VI claimed an unconstitutional taking of private property without just compensation. Sometime during the proceedings, count II came to be known as both the preemption and estoppel count, and a breach of contract claim was incorporated as count VII.

The circuit court entered judgment in favor of plaintiffs and against defendants as to count I (declaratory judgment), count II (preemption), count IV (procedural due process), and count V (substantive due process). Consequently, the court permanently enjoined defendants from applying the ordinance to plaintiffs and ordered defen-

dants to issue plaintiffs a permit for the landfill site. Also, the court dismissed without prejudice count II (estoppel) and count IV (taking), with leave to reinstate if necessary. The breach of contract claim (count VII) remains pending in the circuit court. For the reasons that follow, we find the circuit court erred in finding in favor of plaintiffs as to the constitutional claims. Accordingly, we remand the cause for further proceedings consistent with this decision.

I. FACTS

Plaintiffs in this case are Land and Lakes Company (Land and Lakes) and Stony Island Reclamation Company (Stony Island). Land and Lakes operates a 79-acre sanitary landfill located at 122nd Street and Stony Island (122 Street site) in Chicago. Stony Island owns the 122 Street site and leases it to Land and Lakes. The 122nd Street site is surrounded by other waste facilities and is 1 to 1½ miles from any residential developments.

In 1978, the IEPA issued Land and Lakes a permit to develop and operate a solid waste disposal facility on nearly 53 acres of the 79-acre site. The permit states, "[t]he issuance of this permit *** does not release the permittee from compliance with other applicable statutes and regulations of the United States, of the State of Illinois, or with applicable local laws, ordinances or regulations." The City Zoning Board of Appeals (Zoning Board) also granted Land and Lakes a special use variance to operate 53 acres of the 122nd Street site. Then, in 1982, the Zoning Board granted Land and Lakes a special use variance to operate a sanitary landfill on the remaining acreage (hereinafter referred to as "27 acres"). After the variance was granted, Land and Lakes pro-

ceeded to develop the remaining 27 acres for operation as part of its landfill, spending over $1.5 million in the process.

On October 1, 1993, Land and Lakes obtained a supplemental operating permit from the IEPA that authorized landfill operations on the entire 122nd Street site. The City was on notice that Land and Lakes had applied for and obtained permits from the IEPA. Land and Lakes, however, had not yet obtained a City permit.

Under the environmental provisions of the Municipal Code of Chicago (Municipal Code), an operator of a sanitary landfill within the City must obtain a permit from the City Department of Environment. Municipal Code of Chicago, Ill. §11-4-250 (1994). Section 11-4-1520(A), (C) of the Municipal Code set forth the requirements for a permit application. Once those requirements are met, section 11-4-1520 (F) requires that the commissioner of the Department of Environment "shall" issue the appropriate permit. Plaintiffs allege that at all relevant times the City had not promulgated any rules or uniform standards under section 11-4-1520 (A), (C) of the Municipal Code. In fact, Commissioner Henry L. Henderson of the Department of Environment testified that interpretation of the ordinance was still evolving and that the information required of applicants under section 11-4-1520(A), (C) of the Municipal Code had increased without notice.

In 1984, the City initially enacted a moratorium ordinance to ban the issuance of permits for new landfills or the "expansion" of existing landfills within the City. The City Council has extended the moratorium periodically. Of import is the extension of the moratorium in 1992 to February 1, 1994. The moratorium was not extended by

February 1, 1994, but reenactment was pending on that date. On February 9, 1994, the City Council extended the moratorium retroactively from February 1, 1994, to February 1, 1996. The reenacted ordinance states, "[t]he commissioner [of the Department of Environment] shall not issue or modify any permit subject to the restrictions in Section 11-4-1520(F) to any person including any applicant whose application was pending prior to the passage of this ordinance." Municipal Code of Chicago, Ill. §11-4-1520(F) (1994).

In 1987, Land and Lakes applied for a City operating permit to expand its landfill to occupy the entire 122nd Street site. The then-commissioner of the Department of Consumer Services (now the Department of Environment) responded to Land and Lakes' application by letter, stating that the commissioner shall not accept, consider, or take action before February 1, 1989, on any application for an extension of a sanitary landfill site. Land and Lakes again applied for a permit and was informed by the commissioner that the moratorium ordinance prohibited the issuance of permits for the expansion of existing landfills.

On December 21, 1987, a City attorney wrote to Land and Lakes, advising it that the moratorium ordinance prohibited the expansion of any landfill, including plaintiffs' landfill, without exception. Notwithstanding this letter, Land and Lakes again applied in 1991 and 1992 for a City permit to operate the remaining 27 acres of the site. The City did not respond to the applications.

Near the end of September 1993, Land and Lakes submitted another permit application for the entire 122nd Street site. Land and Lakes contends the application was

complete and met all of the requirements of section 11-4-1520 of the Municipal Code. While the permit was under review, Land and Lakes began disposing of waste in the 27-acre portion of the 122nd Street site that did not have a permit. The waste received on the 27-acre parcel came largely from the City, although the City contends it was not aware that City garbage was being dumped there. It is clear, however, that in 1993 the City knew or should have known Land and Lakes was using the 27-acre parcel to dispose of waste.

In 1993 and 1994, David Tellez, an inspector for the Department of Environment, inspected the 122 Street site regularly. In early 1993, he noted in an inspection report that Land and Lakes was excavating a new area of the site. Late in 1993, he noted that waste was being disposed of in the new area. The site manager told Tellez that Land and Lakes had an IEPA permit to operate in the new area, but that the City permit was still pending. Tellez had been instructed by the assistant commissioner of the Department of Environment to issue Land and Lakes a citation for the illegal disposal of waste, but when Commissioner Henderson found out, he ordered Tellez not to issue a citation. Commissioner Henderson explained that he was holding discussions with Land and Lakes to settle a dispute over another site; therefore, he did not want to commence litigation. Land and Lakes contends, however, that Commissioner Henderson did not want to alert Land and Lakes that the moratorium had lapsed.

The City's first response to Land and Lakes' September 1993 permit application was a letter sent to Land and Lakes form Commissioner Henderson dated January 20, 1994. The letter informed Land and Lakes that its ap-

plication was incomplete and that the City needed more information before acting on the application. The letter did not indicate the permit would be denied based on the moratorium.

Land and Lakes' consulting engineer, Frank Kudrna, testified the application addressed each item listed in section 11-4-1520(A), (C) of the Municipal Code governing applications. Nonetheless, Kudrna responded to the commissioner's letter by stating that Land and Lakes was compiling additional information requested and would submit the information by February 28, 1994.

On January 31, 1993, Land and Lakes' application was pending before the Department of Environment. Commissioner Henderson submitted amended moratorium language for enactment by the City Council that states, the commissioner "shall not issue or modify any [permit subject to the restrictions in section 11-4-1520(F)] to any person including any applicant whose application was pending prior to the passage of this ordinance." On February 1, 1994, Land and Lakes' application was the only sanitary landfill permit application pending before Commissioner Henderson. On that date, the moratorium had lapsed until the City Council passed the amended moratorium ordinance in the form submitted by Commissioner Henderson on February 9, 1994. Land and Lakes contends its application was complete and satisfied the requirements of section 11-4-1520 of the Municipal Code during the eight-day lapse period of the moratorium. As such, Land and Lakes' permit application was not prohibited by the moratorium.

On March 7, 1994, after the moratorium was reenacted, Commissioner Henderson sent a letter to Land and Lakes denying its request for a permit based on the

moratorium ordinance. The letter ordered Land and Lakes to cease landfilling activities in the unpermitted area immediately. On March 24, 1994, Commissioner Henderson sent Land and Lakes another letter denying the remainder of its application for a permit submitted on September 30, 1993. The letter explained the application was incomplete and inadequate in that it failed to provide sufficient information required by section 11-4-1520 of the Municipal Code.

At the time the moratorium was initially enacted in 1984, only plaintiffs and Waste Management of Illinois, Inc. (Waste Management) owned or operated zoned sanitary landfills in the City that had not yet received City operating permits. Waste Management owns a sanitary landfill facility on 138th Street, commonly known as the CID complex, which is comprised of two landfills: a hazardous waste landfill (Area 2) and a non-hazardous waste landfill (Area 3).

Before the moratorium was enacted, the City issued a permit for Area 3 in 1981 that referred to 25 acres and a maximum elevation of +90 feet Chicago City Datum. By 1986, the permit for Area 3 had increased to refer to 173 acres and a maximum elevation of +110 feet Chicago City Datum. The maximum elevation was again increased from +110 feet to +166 feet Chicago City Datum. Donald Gallay, a former City employee who had the duty of evaluating permit applications for sanitary landfills in the 1980s, testified that this increase in acreage did not violate the moratorium ordinance because Waste Management had previously obtained a special use variance from the Zoning Board. Gallay testified that if he had reviewed Land and Lakes' 1988 application for a permit for the entire 122nd Street site he would have granted a

permit despite the moratorium ordinance because Land and Lakes had a special use variance for the entire 79-acre parcel.

The post-moratorium permits for Area 3 were issued to Waste Management by former Commissioner Jesse D. Madison of the Department of Consumer Services. Commissioner Henderson, the current commissioner of the Department of Environment, testified that he believed Area 3 had been permitted for 173 acres since 1979 and that the specific acreage referred to in Waste Management's permits described the area actually being filled, which changed over time. Unlike Waste Management, Land and Lakes applied for and was issued a permit for only 53 acres of the 79-acre site before the moratorium went into effect. Further, Commissioner Henderson testified that the increased elevation was intended only to compensate for the inability of Waste Management to fill down to the base grade originally identified as the floor of Area 3. The May 30, 1986, permit provides, "this added elevation reflects the changes in the depth trench excavation netting no increase in the total capacity of the landfill." Contrary to Commissioner Henderson's testimony, plaintiffs' expert, Dr. Neil Williams, testified the vertical increase at Area 3 did in fact result in an increase in the solid waste capacity for Area 3.

Similarly, before the moratorium was enacted, the City issued Waste Management a permit for the Area 2 landfill that allowed an elevation of +60 feet Chicago City Datum. In December 1993, after enactment of the moratorium, Commissioner Henderson issued a permit allowing a maximum elevation of Area 2 of +80 Chicago City Datum. The permit states, "[n]o additional waste shall be disposed in Area 2." Commissioner Henderson testified

the increased height was not an increase in waste capacity, but was permitted to allow room for additional cover to stabilize the site and prevent the release of contaminants during closure of the area.

The record shows that prior to the issuance of the 1993 permit, which increased the height of Area 2 from +60 feet to +80 feet Chicago City Datum, Waste Management violated the permit by increasing the height of Area 2 to +71 feet Chicago City Datum. Despite the violation, the City still issued Waste Management a permit to further increase the height of the site. Commissioner Henderson explained that the landfill had reached unpermitted heights before he became commissioner and that he took no action because the landfill was not operating and was only engaged in effecting a proper closure. Commissioner Henderson testified that when he granted an increased elevation for Area 2 he was unconcerned with the materials located between +60 feet and +71 feet Chicago City Datum because those materials were already in place before the enactment of the moratorium.

On March 8, 1994, plaintiffs filed a six-count verified complaint against the City and Commissioner Henderson seeking a preliminary and permanent injunction that would prohibit defendants from applying the moratorium to plaintiffs and require defendants to issue plaintiffs an operating permit for the entire 122nd Street site. On April 13, 1994, defendants filed an answer and affirmative defenses to the verified complaint and a counterclaim that alleged Land and Lakes was operating a landfill without a permit in violation of City ordinances. Defendants sought an injunction prohibiting Land and Lakes from operating the landfill without a permit and also sought fines.

In addition, on May 23, 1994, certain public interest organizations filed a motion to intervene as defendants. Petitioners include: Citizens for a Better Environment, Calumet Ecological Park Association, People for Community Recovery, Southeast Environmental Task Force, Chicago Recycling Coalition, and The Lake Michigan Federation. The trial court denied petitioners' motion to intervene, motion to reconsider, and motion for a Supreme Court Rule 304(a) finding. The Illinois Supreme Court granted a supervisory order in favor of petitioners directing the trial court to enter a Rule 304(a) finding.

After expedited discovery and an evidentiary hearing, the circuit court entered an order granting judgment in favor of plaintiffs and against defendants on four of six counts of the complaint. The court held the moratorium ordinance is unconstitutionally vague and had been applied disparately and arbitrarily by defendants. The court also held the moratorium violates procedural due process and that plaintiffs were deprived of a protected property interest without due process. The court further found the operating permit application section of the Municipal Code (section 11-4-1520(A), (C)) is unconstitutionally vague, but, nonetheless concluded that plaintiffs' permit application met all of the requirements of section 11-4-1520 of the Municipal Code and was submitted during a period that the moratorium was not in effect. Finally, the court summarily found in favor of plaintiffs on the preemption claim, which alleged the IEPA rules and regulations preempted the City's home rule authority to regulate landfills located within its borders. As a result, the court entered a permanent injunction enjoining defendants from applying the moratorium to plaintiffs and interfering with the continued use, develop-

ment, and operation of the sanitary landfill. The court also ordered defendants to issue plaintiffs an operating permit and enjoined them from requiring plaintiffs to submit any further permit applications.

Defendants appeal the merits of the case. Petitioners appeal the trial court's denial of their motion to intervene. We have consolidated both appeals and granted the Sierra Club leave to file an *amicus* brief.

II. ANALYSIS

A. UNCONSTITUTIONAL VAGUENESS

1. Vague on its Face

"[A]ll statutes are presumed to be constitutional [citation], and the party challenging the statute has the burden of clearly establishing its constitutional infirmity." *Opyt's Amoco, Inc. v. Village of South Holland*, 149 Ill. 2d 265, 277 (1992). A legislative enactment is unconstitutionally vague "only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts." *People v. Burpo*, 164 Ill. 2d 261, 266 (1995). When a legislative enactment is challenged as unconstitutionally vague, courts "will assume 'the words used in a statute have their ordinary and popularly understood meanings.'" *People v. Fabing*, 143 Ill. 2d 48, 54 (1991), quoting *People v. La Pointe*, 88 Ill. 2d 482, 499 (1981). However, an ordinance must also put reasonably intelligent persons on notice as to what the ordinance requires or prohibits. *Broadrick v. Oklahoma*, 413 U.S. 601, 607-08, 37 L. Ed. 2d 830, 837, 93 S. Ct. 2908, 2913 (1973).

The moratorium ordinance provides in part, "no permit shall be issued nor modification of any permit allowed for the *expansion* of any existing sanitary landfill or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal." (Emphasis added.) Municipal Code of Chicago, Ill. §11-4-1520(F) (1994). The circuit court found the term "expansion" to be unconstitutionally vague because it is undefined in the ordinance and no rules and regulations have been promulgated to define it. According to the court, this "potent ambiguity renders the moratorium unconstitutionally vague."

We disagree. In our view, the term "expansion" is not unconstitutionally vague, but is commonly used and easily understood in this case as meaning to increase the size or capacity of a landfill. Therefore, the term need not be defined in the ordinance. See *Polyvend, Inc. v. Puckorius*, 77 Ill 2d 287, 300 (1979) (holding that words or phrases need not be defined in a statute where they are commonly used and understood).

Moreover, the Illinois Supreme Court has previously considered the meaning of "expansion" in connection with landfills. The court defined it as follows: "[t]o expand the boundaries of a landfill, whether vertically or laterally, in effect, increases its capacity to accept and dispose of waste." *M.I.G. Investments, Inc. v. Environmental Protection Agency*, 122 Ill. 2d 392, 401 (1988); see also *Toys "R" Us, Inc. v. Adelman*, 215 Ill. App. 3d 561, 569 (1991) (defining the term "expand" as to increase the extent, number, volume, or scope of, to enlarge, or to extend); Webster's Collegiate Dictionary 408 (10th ed. 1993) (same). In the instant case, the word "expansion" has the same commonly understood meaning as defined in *M.I.G.*

Investments. Accordingly, we hold the moratorium is not unconstitutionally vague.

Plaintiffs contend, however, that the moratorium ordinance is unconstitutionally vague because one cannot determine from its language whether it applies to land with a preexisting special use variance or allows alteration of permitted boundaries with no net effect in waste capacity. This argument is unpersuasive. The moratorium ordinance contains unequivocal language prohibiting the issuance of *any* permit that allows the expansion of an existing landfill. No words of limitation are contained in the moratorium ordinance.

Also, plaintiffs contend the moratorium in unconstitutionally vague because it vests discretionary power in the commissioner to apply the moratorium without providing definite terms to guide the exercise of the commissioner's power. In support, plaintiffs rely on *P B M Stone, Inc. v. Palzer*, 251 Ill. App. 3d 390, 395-96 (1993), which held that where an ordinance leaves the decision to grant or deny a license or permit solely within the discretion of an administrator or City official and does not contain any standards or guidelines by which to judge the issuance of such license or permit, the ordinance is unconstitutional.

This argument is equally without merit and contradicts plaintiffs' main contention, namely, that once the requirements of the permit application are met, the commissioner *shall* issue a permit. We recognize that although section 11-4-1520 of the Municipal Code uses the word "shall" in directing the commissioner to issue a permit, section 11-4-380 of the Municipal Code, also dealing with landfill permits, uses the word "may" in describ-

ing the commissioner's duty to issue a permit. Contrary to plaintiffs' contention, however, this indicia of discretion does not result in an unconstitutional delegation of authority because the commissioner's discretion is restrained by other sections of the Municipal Code, such as section 11-4-1550, which sets forth operational requirements for specific aspects of landfills. It is also restrained by local, state, and federal regulations.

2. Vague as Applied

The circuit court held the moratorium ordinance was vague as applied by defendants to plaintiffs. However, a statute is vague as applied only if it requires a person of common intelligence to guess whether the statute applies to him or her. See *Fabing*, 143 Ill. 2d at 57-58. Moreover, inconsistent administration does not necessarily render an ordinance vague if it clearly applies to the complaining party.

In this case, Land and Lakes only had a permit for 53 acres of the 122nd Street site. A person of common intelligence would not have to guess whether an increase from 53 acres to 79 acres of landfill space is an expansion prohibited by the moratorium. Moreover, the record makes clear that plaintiffs knew or should have known the moratorium applied to the 122nd Street site. In 1987 and 1988, Land and Lakes applied for a permit to "expand the boundaries" of the landfill to encompass the entire site. In both years, the commissioner responded by stating the moratorium ordinance prohibited the issuance of a permit for expansion of the existing landfill. Also, in December 1987, a City attorney sent Land and Lakes a letter informing it that the moratorium prohibit-

ed expansion of any landfill, including plaintiffs' landfill. Finally, in October 1988, the owner of Land and Lakes wrote a letter to the City's Deputy Chief Operating Officer stating that Land and Lakes had been granted an extension of the 122nd Street site by the Zoning Board prior to enactment of the moratorium and that Land and Lakes was the only landfill that had an IEPA permit for an extension in the City.

The above-stated facts show plaintiffs understood the moratorium applied to expansion of the 122nd Street site. As such, we reject their bald assertion that the moratorium is vague as applied to the 122nd Street site.

B. SUBSTANTIVE DUE PROCESS

1. Rational Relation Test

The circuit court also held the moratorium ordinance violated plaintiffs' substantive due process rights, such that defendants had applied the moratorium ordinance so arbitrarily as to render it unconstitutional. We disagree.

Substantive due process is limited to the domain of fundamental rights. *Reno v. Flores*, 507 U.S. 292, 302, 123 L. Ed. 2d 1, 16, 113 S. Ct. 1439, 1447 (1993). The operation of landfills is not a fundamental right. *Mid-American Waste Systems v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995). Depositing waste in landfills is a highly regulated area and the only interest at stake for plaintiffs in this case is a monetary interest, which is not a fundamental right. *Mid-American Waste Systems*, 49 F.3d at 291.

With regard to zoning ordinances that do not implicate fundamental rights, substantive due process only requires that the ordinance bears a reasonable relationship to a proper legislative purpose and is not arbitrary or discriminatory. *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 453 (1979). Under this so-called rational relationship test, as long as a court can conceive of any rational reason for the law or ordinance, it should be upheld. *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 226 (1989). The relevant inquiry is not whether the court agrees with the legislation, but rather whether the rationality of the legislation is at least debatable. If it is, the requirements of substantive due process are met. *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F. Supp. 75, 81 (D.R.I. 1989).

Recently, in *Pro-Eco, Inc. v. Board of Commissioners*, 57 F.3d 505, 514 (7th Cir. 1995), the court held that an ordinance limiting landfill operations violates substantive due process only if it is arbitrary, unreasonable, and has no substantial relation to the public health, safety, or general welfare. The court noted that concern for public health, safety, and welfare was a sufficient reason to satisfy substantive due process. Therefore, the court upheld a zoning ordinance placing a moratorium on landfills under the rational relation test. *Pro-Eco*, 57 F.3d at 514.

Similarly, in the case *sub judice*, the moratorium ordinance regulating the disposal of waste is not arbitrary or unreasonable, but is rationally related to protecting the public health, welfare, and the environment. The objectives of the moratorium are well within the scope of the City's power to regulate waste disposal and landfill prop-

erty, and the City Council reasonably could have concluded that its objective served the best interests of the community and that the moratorium was a reasonable means of achieving that goal. Consequently, the requirements of substantive due process are satisfied.

Plaintiffs maintain, however, that the moratorium should be deemed invalid because it is not reasonably fashioned to address an immediate health or safety hazard in light of the burden it places on a protected property interest. Plaintiffs also contend defendants did not act in good faith and diligently in pursing the underlying problems that gave rise to the moratorium.

As stated above, due process requires the government to act reasonably and non-arbitrarily in enacting legislation or regulations for the public good. *Opyt's Amoco*, 149 Ill. 2d at 269-70. For example, in the instant case, where an ordinance prohibits certain activities, those activities must be causally related to the harm the drafters of the ordinance sought to guard against. See *Opyt's Amoco*, 149 Ill. 2d at 270. A party challenging a zoning ordinance that does not involve fundamental rights bears a heavy burden of proving the legislative body enacting the ordinance acted arbitrarily and irrationally in violation of substantive due process. *Smithfield Concerned Citizens*, 719 F. Supp. at 81. In this case, the moratorium ordinance addresses a valid public concern in a reasonable manner. It directly addresses the issue of dumping garbage in the City, which is rationally related to the public health and welfare. See *Pro-Eco*, 57 F.3d at 514. Plaintiffs have not shown otherwise. Therefore, we hold the enactment of the moratorium and its application is constitutionally permissible under due process.

2. Arbitrary Administration

Plaintiffs also argue defendants violated their due process rights by administering the ordinance arbitrarily by granting a permit to Waste Management while denying a permit to plaintiffs.

Governmental action is not arbitrary unless it is entirely unreasonable (*Swank v. Smart*, 898 F.2d 1247, 1252 (7th Cir. 1990)) or not done according to reason or judgment. *Ashcraft v. Board of Education of Danville*, 83 Ill. App. 3d 938, 940 (1980). "The government need not prove the reason to a court's satisfaction." *Northside Sanitary Landfill v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990).

In this case, defendants explained that it granted Waste Management a permit for additional height on its Area 2 site only to accommodate proper closure of the site. The permit did not allow Waste Management to increase the waste disposal capacity of Area 2. Also, the permits issued for Area 3 that allowed an increase in elevation did not allow Waste Management to expand the landfill to a capacity greater than the amount previously permitted. Rather, the first of the permitted changes was a result of Waste Management's need to dispose of garbage in shallow trenches before it had time to complete excavation of the trenches to the proper depth. The second of the changes in Area 3 permitted 173 acres for landfill use even though the previous permit had stated the area was 70 acres. The commissioner testified that it was probable that Waste Management had received a permit for the entire 173 acres before the moratorium went into effect. Consequently, the post-moratorium permit was consistent with the moratorium

ordinance. The commissioner explained that in 1979, Waste Management had applied for a permit for 173 acres of Area 3, but the permit issued subsequently only referred to the acreage that was actually being filled with waste, which increased over time.

Defendants further explained that plaintiffs' situation is unlike that of Waste Management in that (1) plaintiffs do not claim that adding 27 acres to the permit for the 122nd Street site would not add capacity; and (2) unlike Waste Management, plaintiffs did not originally apply for a permit for the entire parcel of the site, but only sought a permit for the additional 27 acres after the moratorium was in effect. Thus, there is a rational explanation as to why the City applied the moratorium to plaintiffs and not to Waste Management. Again, any conceivable rational explanation will suffice to justify defendants' actions. *Triple A Services*, 131 Ill. 2d at 226.

Defendants also contend that even assuming *arguendo* they erred in granting Waste Management a permit for the CID complex, they were not required to repeat their mistake by now granting plaintiffs a permit for expansion of the 122nd Street site. We agree. Defendants last allowed Waste Management to increase the CID complex in 1986, eight years and two administrations before the events leading to the denial of plaintiffs' permit. Simply because defendants may have made an error in enforcing the moratorium against Waste Management, they are not compelled to repeat their mistake, but are allowed to begin a sound enforcement scheme. See *City of Chicago v. Unit One Corp.*, 218 Ill. App. 3d 242, 246-48 (1991); *G & S Mortgage & Investment Corp. v. City of Evanston*, 130 Ill. App. 2d 370, 375-76 (1970). Moreover, a mere

error in administering the ordinance to Waste Management does not make the moratorium unconstitutional, nor does it compel the conclusion that defendants' actions toward plaintiffs was arbitrary and violative of due process. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 202, 103 L. Ed. 2d 249, 263, 109 S. Ct. 998, 1006-07 (1989); *Hartland Sportsman's Club v. Town of Delafield*, 35 F.3d 1198, 1202 (7th Cir. 1994); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

In response, plaintiffs cite *Browning Ferris v. City of Maryland Heights*, 747 F. Supp. 1340 (E.D. Mo. 1990), to support their argument that defendants arbitrarily and inconsistently applied the moratorium to plaintiffs and Waste Management. In *Browning Ferris*, the plaintiff had operated a landfill since 1972. In 1985, the municipality passed an ordinance requiring licensure for the use of property for dumping or disposal. The plaintiff's first application for a permit was approved, but its second application was denied. The court held the ordinance was invalid as applied because despite the fact the plaintiff had complied with all of the safety requirements of receiving a permit, the City denied the permit in violation of its own ordinance requirements. *Browning Ferris*, 747 F. Supp. at 1348.

Browning Ferris is distinguishable, however, because there, the municipality violated its own ordinance by failing to issue a permit to the plaintiff, while here, the City's failure to issue a permit to plaintiffs was a proper application of the moratorium ordinance. Nothing in the language of the moratorium supports the conclusion that it does not apply to a landfill, like the 122nd Street site,

which previously received a special use variance. The moratorium simply prohibits the commissioner from issuing any operating permit that allows the expansion of an existing landfill, without exception. Moreover, the resolution of the Zoning Board granting plaintiffs a special use variance states that the use of the 122nd Street site must comply with all state and local laws, which would necessarily include the moratorium ordinance. Although Donald Gallay testified for plaintiffs that an increase in acreage of a landfill did not violate the moratorium if the landfill already had a special use variance, correspondence from Commissioner Henderson and the City attorney refute this interpretation of the moratorium. To be sure, the language of the moratorium itself makes no exception for any landfill that has a special use variance from the Zoning Board.

C. PROCEDURAL DUE PROCESS

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31, 96 S. Ct. 893, 901 (1976); *Balmoral Racing Club v. Illinois Racing Board*, 151 Ill. 2d 367, 404 (1992). In order to assert a claim of denial of due process, a plaintiff must possess a constitutionally protected property right. *Board of Regents v. Roth*, 408 U.S. 564, 576, 33 L. Ed. 2d 548, 560, 92 S. Ct. 2701, 2708 (1972). To have a protected property interest, a person must have more than a unilateral expectation to an interest in benefits,

but must have a legitimate claim of entitlement to it. *Roth*, 408 U.S. at 577, 33 L. Ed at 561, 92 S. Ct. at 2709.

While an ordinance can create a constitutionally protected property interest, to do so it must have "binding force." *Hohmeier v. Leyden Community High School*, 954 F.2d 461, 465 (7th Cir. 1992); *LaSalle National Bank & Trust Co. v. City of Chicago*, 128 Ill. App. 3d 656, 665 (1984). That is, it must contain "'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion." *Wallace v. Robinson*, 940 F.2d 243, 247 (7th Cir. 1991), quoting *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 463, 104 L. Ed. 2d 506, 517, 109 S. Ct. 1904, 1910 (1989). The moratorium here does not mandate that the commissioner automatically issue a permit to all applicants whose applications cursorily touch upon the informational requirements set forth in the Municipal Code. Rather, the moratorium ordinance requires the commissioner, before issuing a permit, to exercise some amount of discretion by considering relevant state, local, and federal laws, and other operating requirements set forth in the Municipal Code. See Municipal Code of Chicago, Ill. §§11-4-380, 11-4-1550 (1994).

There is no question that plaintiffs have a legitimate interest in the procedure for granting a landfill permit. That interest, however, does not amount to a protected property interest in obtaining a permit. "'[T]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits.' (Emphasis added)." *LaSalle National Bank & Trust*, 128 Ill. App. 3d at 665, quoting *Roth*, 408 U.S. at 576, 33 L. Ed. 2d at 560, 92

S. Ct. at 2708. Having never acquired a permit for the 27-acre parcel of the 122nd Street site, plaintiffs have no constitutionally protected property right in the permit sought. Moreover, having violated the moratorium ordinance by illegally dumping waste in the 27-acre site before receiving a permit, plaintiffs have vitiated their claim of entitlement to a permit.

In holding that the permit section of the Municipal Code gives Land and Lakes a protected property interest in obtaining a permit, the circuit court relied on *Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981). In *Martell*, the court held the plaintiff had a property interest in receiving a permit where once the plaintiff had already been issued a development permit and had passed the required certification and inspection, an operating permit automatically issued under applicable law. *Martell*, 511 F. Supp. at 739. However, in the instant case, at the time Land and Lakes submitted its permit application, the moratorium ordinance was already in effect prohibiting the issuance of any permit to expand existing landfills.

In the present case, the circuit court also held Stony Island has a protected property right in the permit because it owned the land upon which Land and Lakes operated the landfill. In support, the court cited *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994), for the proposition that ownership of land is a protected property interest under the Due Process Clause.

We disagree with plaintiffs' contention that a property owner is automatically entitled to notice and a hearing before denial of a permit to use its property as a landfill.

Rather, all due process requires is that the decision-maker consider the written permit application tendered. See *River Park*, 23 F.3d at 166-67. This is especially true here, where plaintiffs are seeking a permit to expand a sanitary landfill, which is a highly regulated industry subject to public control. See *Mid-American Waste Systems*, 49 F.3d at 291.

Finally, plaintiffs rely on *Pioneer Trust & Savings Bank v. County of Cook*, 71 Ill. 2d 510 (1978), where the plaintiff made significant expenditures developing a nursing home after the zoning board approved rezoning of the plaintiff's property after it issued findings encouraging the development and after the plaintiff was issued a building permit for the prototype project. The plaintiff's subsequent permit application for the actual development of the site was then refused because a comprehensive change to the zoning ordinance was under consideration. A month later, a moratorium went into effect prohibiting the issuance of building permits. The plaintiff's permit was summarily denied. The supreme court affirmed judgment for the plaintiff on the basis that where a party has changed its position, made expenditures, or incurred obligations in good faith in reliance on the probability of a permit, then the party has a vested property right in the use of his property for its original purpose notwithstanding subsequent zoning changes. Plaintiffs contend that like the plaintiff in *Pioneer Trust & Savings Bank*, Land and Lakes also made significant expenditures of money in preparing the 27-acre site for landfill activities. Thus, it had a vested property right in the use of its land as a landfill despite enactment of the moratorium.

However, unlike *Pioneer Trust & Savings Bank*, there is no evidence that the City gave Land and Lakes assurances that it would receive a permit. In fact, Land and Lakes expended money in preparing the 27-acre site before it even applied for and was later denied the City permit. Land and Lakes began developing the remaining 27 acres for operation after it received a special use variance from the Zoning Board in 1982. It does not logically follow, then, that Land and Lakes' expenditure of money to prepare the site was caused by assurances from the City or made in reliance on the probability of a permit. Further, in *Pioneer Trust & Savings Bank*, the plaintiff had originally received approval for a building permit for his prototype project, but then was denied the permit for the actual development of his project because of a moratorium that prohibited the issuance of building permits. Conversely, in the case *sub judice*, Land and Lakes had yet to receive a City permit to operate a landfill for the 27-acre parcel prior to the moratorium going into effect. Thus, it cannot be said that Land and Lakes had a vested property right in the use of its land as a landfill despite enactment of the moratorium.

D. PREEMPTION

Finally, we address the circuit court's ruling in favor of plaintiffs that the IEPA rules and regulations preempted the City's authority to regulate landfills within the City.

Pursuant to section 6(a) of article VII of the Illinois Constitution, a home rule unit like the City "may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public

health, safety, morals and welfare ***." Ill. Const. 1970, art. VII, §6(a). Such powers and functions of home rule units shall be construed liberally. Ill. Const. 1970, art. VII, §6(m); see *Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 174 (1992). Moreover, the powers of home rule units may be exercised and performed concurrently with the State unless the General Assembly specifically limits the concurrent exercise or specifically declares the State's exercise to be exclusive. Ill. Const. 1970, art. VII, §6(h), (i); *Village of Bolingbrook v. Citizens Utilities Co.*, 158 Ill. 2d 133, 138 (1994). Thus, State agencies may not limit or preempt home rule powers unless the General Assembly specifically declares otherwise. In this instance, the General Assembly specifically declares otherwise. In this instance, the General Assembly did not preempt home rule powers when it enacted the IEPA.

The regulation of sanitary landfills is a matter pertaining to the government and affairs of a home rule unit and clearly falls within the City's home rule powers to regulate. *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 511 (1979). Our supreme court has held that home rule units may legislate concurrently with the State on environmental matters, such as the regulation of sanitary landfills. *John Sexton Contractors*, 75 Ill. 2d at 513; see also *City of Chicago v. Krisjon Construction Co.*, 246 Ill. App. 3d 950, 955 (1993). However, home rule legislation in the area of environmental control must conform to uniform standards established by the legislature. *John Sexton Contractors*, 75 Ill. 2d at 514. Further, home rule units cannot impose requirements that directly conflict with the uniform pollution standards established by the legislature. *Village of Carpentersville v. Pollution Control Board*, 135 Ill. 2d 463, 474 (1990).

The moratorium ordinance does not conflict with the pollution control standards set by the General Assembly and nothing in the IEPA releases sanitary landfill operators from their obligation to obtain permits from home rule units. Indeed, the IEPA explicitly requires operators to comply with all local laws and ordinances, which in this case would include the City moratorium ordinance governing operating permits. Additionally, the General Assembly has declared that the use of landfills is the least favored method of solid waste disposal and that it is State policy to reduce reliance on landfills. 415 ILCS 20/2(b) (West 1994). Therefore, the moratorium ordinance governing new or expanded landfills within the City does not conflict with the policy or standards established by the General Assembly.

Plaintiffs maintain the provisions of the moratorium governing landfill permits are vague and unclear, and in direct conflict with the standards adopted by the legislature. However, plaintiffs' allegations themselves are vague and non-specific, and fail to identify any purported conflict between the moratorium provisions and the IEPA. Consequently, they amount to nothing more than conclusory statements that are insufficient to preempt the City's home rule powers. Nevertheless, even assuming *arguendo* there is a conflict between the moratorium ordinance and the permit requirements of the IEPA, an individual permit does not necessarily amount to a uniform state policy or standard established by the legislature. *Village of Carpentersville*, 135 Ill. 2d at 474. Therefore, plaintiffs' contention is unavailing.

We are likewise unpersuaded by plaintiffs' reliance on *Harris Bank of Roselle v. Village of Mettawa*, 243 Ill.

App. 3d 103 (1993). In *Harris Bank of Roselle*, the challenged ordinance did not fall within the home rule authority of the municipality because of its extraterritorial effect, something clearly not at issue here. The court's comments concerning home rule units were mere *dicta*, as evidenced by the court's note that the arguments of the parties with regard to home rule powers were "immaterial." The court then went on to analyze the case under a section of the Municipal Code dealing with extraterritorial exercises of police power. *Harris Bank of Roselle*, 243 Ill. App. 3d at 114-15. That section, however, is inapposite to the instant case, and, thus, so is the court's analysis. For all these reasons, the circuit court erred in granting judgment in favor of plaintiffs on the claim of preemption.

III. CONCLUSION

In light of our conclusion that the moratorium ordinance is not unconstitutionally vague or violative of due process, we need not address the other issues raised by the City or petitioners' motion to intervene because at oral argument petitioners made clear that they had no interest in the other claims pending or those dismissed without prejudice.

For the aforementioned reasons, we find the circuit court erred in holding in favor of plaintiffs and against defendants as to count I (declaratory judgment), count II (preemption), count IV (procedural due process), and count V (substantive due process). Accordingly, we vacate the permanent injunction imposed on defendants based on counts I, II, IV, and V, and remand the cause for further proceedings consistent with this decision. We ex-

press no opinion concerning the propriety of injunctive relief based on count II (estoppel) or count VI (taking), which were dismissed without prejudice with leave to reinstate if necessary, or relief based on count VII (breach of contract), which remains pending in the circuit court.

Reversed and remanded.

RAKOWSKI, J., with ZWICK, P.J., and McNAMARA, J., concurring.

[Entered September 27, 1994]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LAND AND LAKES COMPANY, et al.,	)	
	)	
Plaintiffs,	)	
vs.	)	No. 94 CH 2093
	)	
	)	
HENRY L. HENDERSON, et al.,	)	
	)	
Defendants.	)	

FINDINGS OF FACT, MEMORANDUM OF LAW AND ORDER

INTRODUCTION

Plaintiffs, Land and Lakes Company and Stony Island Reclamation Company (hereinafter "Land and Lakes"), commenced the instant action on March 8, 1994 following a decision by the City of Chicago ("the City") Department of Environment (the "DOE") on March 7 to deny plaintiffs an operating permit on a 27 acre portion of their 79 acre 122nd Street sanitary landfill facility (the "122nd Street Facility"). The City, through the Department of Environment, denied the operating permit based upon Section 11-4-1520(F) of the Environmental Protection and Control Ordinance, commonly known as the landfill moratorium ordinance (the "moratorium").

Land and Lakes filed a six-count Verified Complaint for Declaratory Judgment, Injunctive Relief, and Damages against the City of Chicago and Henry L. Hender-

son, the Commissioner of the Department of Environment. Land and Lakes seeks a preliminary and permanent injunction restraining the City and Commissioner Henderson from interfering with its landfill operations on the basis of the moratorium. At the preliminary hearing, the Court took evidence on Counts I, III, IV and V of the Verified Complaint. Count I of Land and Lakes' Verified Complaint seeks a declaration that the moratorium does not apply to the 122nd Street Facility because that facility, in its entirety, has been properly zoned for sanitary landfill use since 1982. Count III seeks a declaration that the moratorium is preempted by the laws of the State of Illinois and the rules and regulations of the Illinois Environmental Protection Agency ("IEPA"). Count IV alleges that the moratorium violates Land and Lakes' procedural due process rights under the United States Constitution and the Illinois Constitution as it deprives Land and Lakes of a protectable property interest without a fair hearing. Count V alleges that the moratorium violates Land and Lakes' substantive due process rights under the United States Constitution and Illinois Constitution because it is unintelligibly vague and because it has been applied in an arbitrary and capricious fashion by defendants.

In addition to the Verified Complaint, Land and Lakes also filed a Motion for Temporary Restraining Order and a Motion for Expedited Discovery on March 8, 1994. This Court heard the Motion for Temporary Restraining Order on said date with both Land and Lakes and the City present through their counsel. Having determined that Land and Lakes raised a fair question with respect to each of the necessary showings for temporary injunctive relief, this Court entered a temporary restraining

order on March 8, 1994 which enjoined the City from interfering with Land and Lakes' sanitary landfill operations at 122nd Street. The Court further granted Land and Lakes' motion for Expedited Discovery on March 8, 1994, in order to prepare for a preliminary injunction hearing.

On April 13, 1994, the City filed its Answer and Affirmative Defenses to the Verified Complaint and a seven-count First Amended Counterclaim. Subsequently, on July 7, 1994, the City voluntarily dismissed Counts III, IV and V of the counterclaim. In Counts I and II of its counterclaim, the City seeks a determination that Land and Lakes has illegally expanded its landfill within the meaning of the moratorium and that a public nuisance has resulted from Land and Lakes' alleged illegal operations on the 27 acre parcel. Counts VI and VII of the counterclaim seek a declaration that the moratorium is constitutional and that it applies to the 27 acre parcel. The City also had filed a Motion for Preliminary Injunction which seeks an order requiring Land and Lakes to cease landfill operations on the 27 acre parcel.

The defendants, the City of Chicago and Henry L. Henderson, contend that in order to operate a landfill in the City of Chicago, Land and Lakes must obtain a zoning permit, an annual City of Chicago operating permit from the Department of Environment, and IEPA development and operating permits.

They contend further that in October, 1993, Land and Lakes knowingly began dumping garbage on the 27 acre parcel at the 122nd Street site without a permit from the City of Chicago. That at no time has Land and Lakes received a permit or other written approval from the City

of Chicago authorizing the dumping of garbage in the 27 acre parcel.

They contend further that the Chicago City Council has the authority to regulate sanitary landfills within the City and has set forth a system for regulating landfills that adequately protects the public health and welfare, including a permitting program. The City Council has expressly delegated the oversight and management of sanitary landfills, including the property to issue operating permits, to the Department of Environment. Sec. 11-4-020; 2-30-030(16). The Department of Environment which has been in existence since Jan. 1, 1992 and has the expertise to perform its delegated functions. They contend that prior to January, the Department of Consumer Services and the Bureau of Inspectional Services had the authority to issue sanitary landfill permits.

They further contend that the Municipal Code defines "sanitary landfills" as a facility originally permitted under Ch. 11-4 and operating, prior to Jan. 1, 1985, for the disposal of waste on land. Sec. 11-4-120.

They further contend that a landfill operator cannot begin accepting waste without first obtaining a written permit from the Commissioner of the Department of Environment. "No changes, additions, expansions or extensions" to any landfill can be made "without having obtained a written permit from the Commissioner." Sec. 11-4-250.

They further contend that the IEPA provides for the exercise of authority by the City and the State in the area of environmental regulation and permitting. 415 ILCS 5/1 *et seq.*

They further contend that the Delegation Agreement between the State of Illinois and the City recognizes and encourages local regulation of landfills. The Delegation Agreement recognizes that Chicago is a home rule unit of government that has distinct but concurrent authority to regulate environmental matters within the City of Chicago. With regard to permitting, they contend that the Delegation Agreement provides only that "the issuance of *Agency* permits shall remain "the sole discretion and responsibility of the agency."

They state that Sec. 5(C) of the Standard Conditions routinely attached to IEPA development and operating permits requires compliance with all local ordinances and is not limited to zoning approvals.

They further contend that according to the Illinois Solid Waste Management Act and the City's Solid Waste Management Plan landfilling is the least favored alternative for solid waste management, after waste reduction, recycling and incineration. 415 ILCS 20/2 ("B").

The City contends that in 1984, the City Council passed a moratorium prohibiting the Commissioner of the Department of Consumer Services from accepting, considering, or taking action on an application for a permit for the expansion of any sanitary landfills. They contend that since that time the moratorium has been renewed and is currently in effect until February 1, 1996. They contend that the moratorium currently prohibits the Commissioner of the Department of Environment from issuing a permit to an operator who seeks to establish a new landfill or expand an existing landfill. Sec. 11-4-1520(F).

From August 2nd to August 12, 1994, the Court held an evidentiary hearing on the pending request for injunctive relief. Closing arguments were heard and trial briefs were submitted by both sides wherein both sides offered their Suggested Findings of Facts, Memorandum of Law, and *Suggested Orders*.

The Court had the opportunity to hear the testimony of a myriad of witnesses, the opportunity to observe their demeanor and weigh their credibility, and further the Court had the benefit of reviewing of the evidence that was admitted. The March 8, 1994 TRO has remained in full force and effect throughout the proceedings until further order of this Court.

FINDINGS OF FACT

Based upon all of the evidence and considering same in its totality, and having reviewed all of the pleadings, and reviewing the Court's copious notes the following Findings of Fact are made:

1. Land and Lakes Company is a corporation duly organized and existing under the laws of the State of Illinois, with its principal place of business located at 123 North Northwest Highway, Park Ridge, Illinois. Land and Lakes is in the waste disposal business and has operated landfills in the City of Chicago for over 20 years.

2. Stony Island Reclamation Company ("Stony Island") is also a corporation duly organized and existing under the laws of the State of Illinois. Stony Island is the legal owner of a 79-acre parcel of real property bounded by East 118th Street on the north, South Stony

Island Avenue on the west, East 122nd Street on the south and an irregular line 133 feet west of and parallel to South Paxton Avenue on the east (hereinafter the "122nd Street Facility"). Stony Island leases the 122nd Street Facility to Land and Lakes, which has operated a sanitary landfill on the subject premises for over approximately 15 years.

3. The City of Chicago is a municipal corporation duly organized and existing under the laws of the State of Illinois with its principal place of business located in Cook County at 121 North LaSalle Street, Chicago, Illinois.

4. The DOE is an agency of the City of Chicago. The Commissioner of the DOE is Henry L. Henderson. The DOE exercises authority over the permitting and policing of sanitary landfills within the City of Chicago.

5. The 122nd Street facility is situated in the Southeast Industrial District, an area which is heavily industrial and which is comprised primarily of waste disposal facilities serving the City of Chicago and other area vendors. The subject parcel is substantially removed from any residential developments.

6. The 122nd Street Facility has been zoned in its entirety for use as a sanitary landfill since 1982. Specifically, 53 acres on the western portion of the 122nd Street Property were initially zoned for use as a sanitary landfill pursuant to a Resolution by the Zoning Board of Appeals of the City of Chicago ("ZBA"), Cal. No. 256-76-S adopted January 13, 1977 and amended on February 17, 1977, October 21, 1977 and March 16, 1979.

7. The remaining 27 acres were originally zoned as M3-3 Heavy Manufacturing. On or about September 20,

1982, Land and Lakes applied to the Zoning Administrator of the City of Chicago for variation of the originally permitted use for these 27 acres. The ZBA considered the application and found that the proposed use would serve the City's public need, remediate prior environmental conditions, provide a productive use of the land leading to reclamation and would protect the public health, safety and welfare. Based on these findings, the ZBA issued a variance for the special use of the 27 acre parcel as a sanitary landfill on October 15, 1982. The October 15, 1982 special use variance remains in full force and effect.

8. On or about February 24, 1984, the City Council for the City of Chicago first passed an amendment to the Environmental Protection and Control Ordinance (the "Ordinance"), which imposed a moratorium on the creation of the new sanitary landfills and on the "expansion" of existing landfills (the "moratorium"). The moratorium has been renewed from time to time over the last ten years.

9. *The term "expansion" in the moratorium is a term of art which is not defined in the Ordinance or by any rules and regulations.*

10. *As of February 24, 1984, only two landfill operators owned parcels of land within the City of Chicago which were properly zoned for sanitary landfill use, but as yet unpermitted for operation as a sanitary landfill by the Department of Consumer Services, the immediate predecessor of DOE.* These operators were Land and Lakes and Waste Management, of Illinois, Inc. ("Waste Management") which owned, and still owns, a large sanitary landfill facility on 138th Street commonly known as the C.I.D. complex.

11. Following enactment of the moratorium in 1984, the City granted to Waste Management several increases in the permitted boundaries of certain existing landfills located in the C.I.D. Complex known as Area 2 and Area 3.

12. On January 31, 1986, Jesse D. Madison, Commissioner of the Department of Consumer Services, issued a permit to Waste Management which increased the capacity of Area 3 by 103 acres and authorized operations on the entire 173 acres of Area 3 zoned for landfill use. However, at no time before the moratorium did the City issue a permit which authorized operation on more than a 70 acre portion of Area 3. In fact, the City authorized operations only a *25* acre portion of Area 3 in 1980 and 1981, and only on a *70* acre portion of Area 3 from 1982 through 1985. Donald Galley, the Chief Permitting Officer who originated the January 21, 1986 permit for approval by Commissioner Madison, recommended issuance of the permit because Waste Management had secured zoning for the entire 173 acre parcel before enactment of the moratorium.

13. On May 30, 1986, Commissioner Madison also issued a permit addendum to Waste Management which increased the permitted maximum elevation on a portion of Area 3 to +166 feet CCD, although the permitted elevation for Area 3 never exceeded +110 feet CCD before the moratorium. The addendum stated an intent not to increase the permitted waste capacity of Area 3. The addendum resulted in an increase of the actual waste capacity of the landfill.

14. On December 30, 1993, Commissioner Henderson issued an operating permit to Waste Management which

increased the permitted maximum elevation for Area 2 of the CID complex by 20 feet, from +60 feet CCD to +80 feet CCD. In contrast to Commissioner Madison's 1986 addendum on Area 3, this permit served to increase the permitted waste capacity of the landfill.

15. *The City has not applied the moratorium in a uniform fashion and, in doing so, has created several different interpretations of the moratorium to attempt to justify the Waste Management increases.* First, Don Galley, the Chief Permitting Officer under Commissioner Madison, testified the City did not apply the moratorium to preciously zoned landfills. Second, in connection with the vertical expansion of Area 2, the City applied the moratorium to allow an increase in the permitted waste capacity of an existing landfill. Third, and in contrast, in connection with the vertical expansion of Area 3, the City applied the moratorium to prohibit any increase in permitted waste capacity of an existing landfill.

16. *Based on the foregoing, the moratorium is unconstitutionally vague and has been arbitrarily and disparately applied: (1) the term "expansion" is a term of art that is not defined in the ordinance; (2) there are no rules, regulations or standards to define the moratorium; and, (3) the DOE has applied the moratorium inconsistently over the last 10 years resulting in no less than three different interpretations of the term "expansion" and disparate application of the moratorium.*

17. Therefore, the moratorium cannot apply to landfills which secured a special use variance from the ZBA before enactment of the moratorium, because to do so would be unconstitutional. Accordingly, the moratorium does not apply to Land and Lakes in as much as it

secured a special use variance for the entire 122nd Street Facility in 1982, two years before enactment of the moratorium.

18. After obtaining the October 15, 1982 special use variance from the Zoning Board of Appeals, Land and Lakes developed and prepared the 27 acres for operation as a sanitary landfill at considerable expense.

19. On September 29, 1987, the Illinois Environment Protection Agency ("IEPA") issued to Land and Lakes a supplemental permit which authorized development of the entire 122nd Street Facility as a sanitary landfill, including the 27 acre parcel. The City does not issue development permits for a landfill facility. The City, through the Department of Environment permits only the operation of a landfill.

20. On October 1, 1993, the IEPA issued Land and Lakes another supplemental operating permit which authorized actual landfill operation on the 27 acre parcel previously developed in accordance with the September 29, 1987, IEPA developmental permit. Pursuant to state law, the City received written notice in July, 1993 that Land and Lakes sought this IEPA operating permit, and, therefor, was aware of Land and Lakes intent to operate in the 27 acres.

21. *The IEPA permits issued to Land and Lakes are in full force and effect at this time*. Moreover, pursuant to the Delegation Agreement entered into between the IEPA and DOE, the IEPA has expressly retained its authority to permit the development and operation of landfills in the state.

22. Section 11-4-1520 (A) and (C) set forth the requirements for a permit application for a sanitary landfill.

Once the provisions of Section 11-4-1520(A) and (C) are met, the Commissioner is mandated to issue a sanitary landfill permit.

23. No rules, regulations or uniform standards have been promulgated to delineate the the provisions of Section 11-4-1520(A) and (C). Commissioner Henderson admitted that the DOE and the ordinances are "evolving" and that the information required of applicants under Sections 11-4-1520(A) and (C) have increased without published regulations. Section 11-4-1520(A) and (C), therefore, are unconstitutionally vague on their face and as applied.

24. *Moreover, there is no provision in the ordinance to provide an applicant either notice or a hearing relating to an adverse decision on an application.*

25. Land and Lakes submitted an application under Section 11-4-1520(A) and (C) (then Chapter 17-6.4(A) and (C)) to the Department of Consumer Services in 1990. The City issued an operating permit to Land and Lakes in response to the 1990 permit application. In 1991 and 1992, Land and Lakes similarly filed applications which sought a permit to operate the entire 122nd Street Facility. The City retained the $20,000 annual permit fee paid by Land and Lakes in 1991 and 1992, but did not act on the permit applications.

26. On or about September 30, 1993, Land and Lakes submitted an application (the "Application") to the DOE for an operating permit for the entire 122nd Street Facility, including the 27 acre parcel.

27. The Application was complete and met all of the requirements of Section 11-4-1520 of the Ordinance. Land and Lakes, therefore, had a legitimate claim of

entitlement to an operating permit on the entire 122nd Street Facility.

28. In October of 1993, with appropriate zoning from the City of Chicago, all requisite permits from the IEPA, knowledge by the City that it intended to conduct such operations and permit application pending before the DOE, Land and Lakes began disposing of waste on the 27 acre portion of the 122nd Street facility.

29. *The waste received in the 27 acre parcel largely came from the City, which delivered substantial volumes of municipal waste to the site pursuant to a waste disposal contract between Land and Lakes and the Department of Streets and Sanitation.*

30. The City was aware of Land and Lakes use of the 27 acre parcel to dispose of waste and never objected. City Inspector, David Tellez, an employee of the DOE, observed the disposal activities ongoing on the 27 acre parcel in October, 1993 during a regular field inspection. Mr. Tellez reported these activities directly to the DOE in written inspection reports in October and thereafter. Mr. Tellez had previously reported Land and Lakes' development of the 27 acre parcel and its stated intentions to use the parcel for waste disposal in inspection reports submitted to his superiors between January, 1993 and October, 1993.

31. No enforcement actions were taken by the City or the DOE relative to the disposal activities on the 27 acre parcel following receipt of Mr. Tellez's observations and written reports. *In fact, the City continued to dispose of waste in the 27 acre parcel through mid-July 1994.*

32. Based on the foregoing, Land and Lakes had a legitimate claim of entitlement to an operating permit on

the 122nd Street Facility and, contrary to Defendants' claim, Land and Lakes activities did not constitute a nuisance.

33. The City's first response to Land and Lakes' September 30, 1993 permit application was a January 20, 1994, letter from Commissioner Henderson requiring eighteen additional categories of information from Land and Lakes before he would act on the application. This letter sought specific information not required in Sections 11-4-1520(A) and (C). Commissioner Henderson issued the letter to plaintiffs with knowledge that the moratorium would lapse on February 1, 1994 and to forestall litigation until after the moratorium was reenacted.

34. In contrast, Commissioner Henderson granted a permit to Waste Management in 1993 with a condition that information required under Section 11-4-1520, but missing in the application, be submitted after issuance of the permit.

35. On January 31, 1994, while Land and Lakes' application was pending before the DOE, Commissioner Henderson submitted amended moratorium language for enactment by the City Council which provided as follows:

> [C]ommissioner shall not issue or modify any permit subject to the restrictions in section 11-4-1520(F) to any person including any applicant whose application was pending prior to the passage of this ordinance.

36. *On February 1, 1994, Land and Lakes' application was the only Sanitary Landfill Permit Application pending before Commissioner Henderson, and thus the only application affected by the amended language.*

37. The day before the City Council reenacted the moratorium, on February 8, 1994, William Abolt, Assistant Commissioner of the DOE, instructed David Tellez to issue a citation against Land and Lakes for alleged unpermitted waste disposal in the 27 acres. That same day, Commissioner Henderson directed that Mr. Tellez be recalled before he issued the citation because he did not wish to invite or commence litigation with Land and Lakes. Further, Commissioner Henderson did not wish to alert Land and Lakes that the moratorium had lapsed and was not a ban to issuing an operating permit.

38. On February 1, 1994, the moratorium lapsed. No moratorium was thereafter in effect in the City from February 2, 1994 through February 9, 1994. On February 9, 1994, the City Council passed the amended moratorium ordinance proffered by Commissioner Henderson.

39. From February 2, 1994 through February 9, 1994, Land and Lakes' permit application was not prohibited by the moratorium. The application was complete and satisfied the requirements of Section 11-4-1520. *Land and Lakes was entitled to a permit at this time and the DOE's failure to issue a permit was arbitrary and capricious.*

40. On March 7, 1994, after the moratorium was reenacted, Commissioner Henderson notified Mr. James Cowhey of Land and Lakes that he had denied the application for an operating permit for the 27 acre parcel solely on the basis of the moratorium.

41. Neither Land and Lakes nor Stony Island were given any prior notice by Commissioner Henderson of his decision to deny the application on the basis of the moratorium alone, nor of any pre-deprivation or post-deprivation hearing to address the efficacy of that decision.

42. Land and Lakes has demonstrated a strong likelihood of success on the merits. In fact, it has prevailed on the merits and is entitled to a permanent injunction.

43. Without the ability to utilize the 122nd Street Facility as a landfill, Land and Lakes will suffer irreparable harm for which there is no adequate legal remedy. Land and Lakes will certainly lose its present and future livelihood should injunctive relief not be granted.

44. Granting injunctive relief to Land and Lakes will not harm the public interest in a clean and safe environment.

45. The foregoing findings demonstrate Land and Lake's threatened injury outweighs the potential harm or inconvenience the City claims it will suffer.

MEMORANDUM OF LAW

In order to secure a preliminary injunction a party seeking such injunction must demonstrate that: 1) a substantial likelihood of success on the merits exists; 2) it has no adequate remedy at law; 3) it is subject to immediate, irreparable injury; and 4) in the absence of preliminary relief, it will incur greater injury than would be received by the objectors if the relief were granted. *Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B*, 63 Ill.2d 514 (1976).

In showing a substantial likelihood of success on the merits, "a party is not required to make out a case which will in all events warrant relief at the final hearing." *M.B.L. (USA) Corp. v. Diekman*, 112 Ill. App. 3d 229; 445 N.E.2d 928 (1st Dist. 1983). Rather, a party need only demonstrate that a "fair question as to the basis for

permanent relief exists." *Id.*, 445 N.E.2d at 422; *Earthline Corp. v. Mauzy*, 68 Ill. App. 3d 304 (4th Dist. 1979). This Court finds that in this case, the facts support and require entry of a preliminary injunction in favor of Land and Lakes.

Additionally, this Court supports plaintiffs' argument that the Moratorium Ordinance cannot be interpreted to apply to the Land and Lakes 122nd Street facility without causing a violation of plaintiffs' procedural due process rights.

Land and Lakes is entitled to a preliminary injunction because the moratorium, as applied by the City, violates procedural due process. "Procedural Due Process" imposes constraints on governmental decisions which deprive individuals of liberty or property interest within the meaning of the due process clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Supreme Court has consistently held that a hearing is required before an individual is deprived of a property interest. *Id.* at 333. The fundamental requisite of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Here, the ordinance, Chapter 11-4 includes no provision for notice or hearing to protect an applicant's property interest. Thus, the plaintiffs correctly point out, the Ordinance is unconstitutional.

This Court further finds that Land and Lakes has been deprived of a "protectable property interest" within the meaning of the Due Process Clauses of the Illinois and U.S. Constitution. There is no more basic protected property interest than the ownership of real property interest

than the ownership of real property. Certainly, the law has progressed to include as protectable interests under the due process clause rights held in property are beyond actual ownership of real estate, chattel or money. *See, e.g., Board of Regents of State College v. Roth*, 408 U.S. 564, 571 (1972). However, as the Seventh Circuit only recently has reemphasized, in establishing a protected right under this first element of a procedural due process claim, an owner of real property is presumptively "entitled to contend that the City's regulation of that land deprived it of property without due process." *River Park, Inc. v. City of Highland Park*, No. 93-3017, at 3 (7th Cir. 1994).

Moreover, plaintiffs have a protectable property interest in an operating permit because the permit section provides no discretion to the City to issue permits once the applicant satisfied the ordinance's express requirements. *See, e.g., Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981). This Court agrees with plaintiffs that they met all of the permitting requirements in Sec. 11-4-1520(A) and (C).

Land and Lakes is also entitled to a preliminary injunction because the evidence establishes that the moratorium ordinance is unconstitutionally vague and has been inconsistently construed and applied by the City of Chicago. First, the term "expansion" is undefined so that the moratorium cannot be applied in a uniform fashion. Moreover, no rules or regulations have been promulgated to define the term "expansion". This potent ambiguity renders the moratorium unconstitutionally vague. This Court agrees with the plaintiffs that the ordinance is not definite enough to prevent ambiguous application by City officials. *Smithfield Concerned Citizens for Fair Zoning*

the [sic] Town of Smithfield, 719 F. Supp. 75 (D.R.I. 1989).

Beyond its facial ambiguity, the moratorium ordinance also has been applied arbitrarily by the City of Chicago. *See e.g., Browning Ferris Indust. of St. Louis v. City of Maryland Heights*, 1340, 1348 (E.D. Mo. 1990). This arbitrary application of the moratorium readily exposes the unconstitutionally vague nature of the ordinance. The evidence adduced at the injunction hearing established that the DOE permitted several increases in the horizontal and vertical boundaries of Waste Management's landfills using mutually exclusive interpretations of the moratorium.

Finally, this Court fully supports plaintiff's contention that the moratorium ordinance cannot be applied to Land and Lakes' 122nd Street facility because Land and Lakes submitted a complete permit application to the City of Chicago during a period in which the moratorium was not in force and effect.

This Court finds that the City's contention that no permit could be issued in the February 2 through February 9 period of time because Land and Lakes had not submitted a complete application must be rejected for two reasons. First, the permit application section of the Environmental Control Ordinance, Sec. 11-4-1520(A) and (C), is unconstitutionally vague. Second the evidence established that Land and Lakes permit application met the requirement of Sec. 11-4-1520. Thus, plaintiffs correctly argue that the moratorium ordinance is inapplicable to Land and Lake's 122nd Street Facility because the permit was submitted to the City during a period in which the moratorium was not in effect.

The plaintiff, Land and Lakes, has requested that this Court enter a permanent injunction against the City and DOE enjoining them from applying the Moratorium Ordinance to Land and Lakes' 122nd Street Facility and requiring plaintiffs to submit any further permit applications to the DOE under Sec. 11-4-1520(A) and (C) of the Environmental Protection and Control Ordinance. Further, plaintiffs request this Court order the DOE to issue a permit to the plaintiffs to operate the 122nd Street Facility consistent with Land and Lakes' IEPA operating permits.

In addition, they pray that this Court should permanently enjoin defendants from interfering with plaintiffs continued use, development and operation of the 122nd Street Facility as a sanitary landfill based on any permitting provisions of the ordinance. Moreover, they pray that this Court should enter judgment in favor of the plaintiffs and against defendants on Counts I, II, IV and V of plaintiff's complaint and on Counts I, II, VI and VII of defendants' counterclaim.

ORDER

Based on all of the evidence received at the preliminary injunction hearing of the Emergency Motion for TRO and Second Amended Complaint of plaintiffs Land and Lakes Company and Stony Island Reclamations Company ("plaintiffs") and the Motion for Preliminary Injunction of defendants, Henry L. Henderson, in his official capacity as Commissioner of the DOE and the City of Chicago (collectively, "defendants") the Court being fully advised and having made Findings of Fact and

Conclusions of Law incorporated by reference herein, the Court does hereby Order as follows:

1. Defendants are permanently enjoined from applying the Moratorium Ordinance, Title 11, Municipal Code of Chicago, Section 11-4-1520(F), to plaintiffs' entire 79 acre sanitary landfill located at 122nd Street and Stony Island Avenue (hereinafter, the "122nd Street Facility").

2. Plaintiffs are entitled to a permit from the City to operate its entire 122nd Street Facility as a sanitary landfill in accordance with their IEPA operating permits, and the City shall issue forthwith a permit to plaintiffs to operate the 122nd Street Facility that is consistent with the plaintiffs' IEPA operating permit.

3. Defendants are permanently enjoined from requiring plaintiffs to submit any further permit applications to the DOE under section 11-4-1520(A) and (C) of the Environmental Protection And Control Ordinance, Title 11, Municipal Code of Chicago, Section 11-4-010 *et seq.* ("Ordinance"), as currently enacted or applied until further order of Court.

4. Defendants are permanently enjoined from interfering with plaintiffs' continued use, development and operation of the 122nd Street Facility as a sanitary landfill based on any permitting provisions of the Ordinance.

5. Judgment is hereby entered in favor of plaintiffs and against defendants as to Count I (declaratory judgment), Count II (pre-emption), Count IV (violation of procedural due process), and Count V (violation of substantive due process) of plaintiffs' complaint. Count II (estoppel) and Count IV (taking) are dismissed without prejudice with leave to reinstate if necessary. Only Count VII (breach of contract) is extant.

6. Judgment is entered against defendants and in favor of plaintiffs as to Counts, I, II, VI and VII of defendants' counterclaim.

7. Defendants' Motion for Preliminary Injunction is hereby denied with prejudice.

8. This cause is set for status as to Count VII on *November 15, 1994* at 10:00 a.m.

ENTER

/s/ Albert Green
JUDGE

[Entered April 7, 1997]

Nos. 94-3425 & 95-1457

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Plaintiffs-Appellees,
Counter-Defendants/Appellees,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,

Defendants-Appellants,
Counter-Plaintiffs/Appellants.

CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION and THE LAKE MICHIGAN FEDERATION,

Petitioners-Appellants,

v.

LAND and LAKES COMPANY and STONY ISLAND RECLAMATION CO.,

Respondents-Appellees.

O R D E R

IT IS HEREBY ORDERED that Appellees', Land and Lakes Co., and Stony Island Reclamation Co., Petition for Rehearing is hereby DENIED.

/s/ Thomas R. Rakowski, J.

/s/ Daniel J. McNamara, J.

/s/ Morton Zwick, J.

ORDER ENTERED

April 07 1997

Appellate Court, First District

(Letterhead of)

83274

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 1, 1997

Mr. John F. Kennedy
Quinlan & Crisham, Ltd.
161 North Clark Street
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Chicago, IL 60601

No. 83274 – Land and Lakes Company et al., respondents, v. Henry L. Henderson, etc., respondent (Citizens for a Better Environment et al., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to file appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 23, 1997.

Supreme Court, U.S.
FILED
FEB 4 1998
CLERK

No. 97-1109

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

LAND AND LAKES COMPANY,
an Illinois Corporation, and
STONY ISLAND RECLAMATION CO.,
an Illinois Corporation,
Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,
Respondents.

[Title Continued on Inside Cover]

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

BRIEF FOR RESPONDENTS, HENRY L. HENDERSON AND THE CITY OF CHICAGO, IN OPPOSITION

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LAND AND LAKES COMPANY,
an Illinois Corporation, and
STONY ISLAND RECLAMATION CO.,
an Illinois Corporation,
Petitioners,

v.

CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION and THE LAKE MICHIGAN FEDERATION,
Respondents.

QUESTION PRESENTED

Whether substantive due process requires the City of Chicago to issue an operating permit that would allow a landfill to expand when the City Council has enacted a moratorium on the issuance of operating permits for new or expanded sanitary waste landfills.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1109

LAND AND LAKES COMPANY,
an Illinois Corporation, and
STONY ISLAND RECLAMATION CO.,
an Illinois Corporation,
Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,
Respondents.

LAND AND LAKES COMPANY,
an Illinois Corporation, and
STONY ISLAND RECLAMATION CO.,
an Illinois Corporation,
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v.

CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION and THE LAKE MICHIGAN FEDERATION,
Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

BRIEF FOR RESPONDENTS, HENRY L. HENDERSON AND THE CITY OF CHICAGO, IN OPPOSITION

OPINIONS BELOW

The decision of the Illinois Appellate Court is unpublished. The decision of the Circuit Court of Cook County, Illinois, is unpublished. The Illinois Supreme Court denied the petitioners' petition for leave to appeal to that court. The court's order denying leave to appeal is published at 174 Ill. 2d 565, 686 N.E.2d 1163.

JURISDICTION

As we explain more fully below, petitioners incorrectly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). This Court does not have jurisdiction over this matter because no final judgment of the highest court of Illinois has been rendered within the meaning of section 1257(a). A federal claim remains to be resolved in this case: petitioners' takings claim under the United States Constitution which had been dismissed without prejudice when the City took its appeal to the Illinois Appellate Court and has since been reinstated, remains pending in the Circuit Court of Cook County.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

ORDINANCE INVOLVED

The section of the Municipal Code of Chicago, Illinois, in effect at the time this case was litigated in the Circuit Court of Cook County provided, in pertinent part:

> Prior to February 1, 1996, notwithstanding any provision of this chapter: (1) no permit shall be issued nor modification of any permit allowed for the expansion of any existing sanitary landfill or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste dis-

> posal, and (2) no permit shall be issued for the creation or operation of a new sanitary landfill site or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal.

Municipal Code of Chicago, Ill. § 11-4-1520(F) (1994). This ordinance has since been renewed, most recently at the City Council meeting held on January 14, 1998, and is now effective through February 1, 2000.

STATEMENT

The Chicago Environmental Protection Ordinance requires a City operating permit in order to operate a landfill within the City of Chicago. Municipal Code of Chicago, Ill. § 11-4-5-1500(e)(1990). The moratorium ordinance—at issue in this case—places a temporary moratorium on the issuance of operating permits for new landfills within the City and on permits that would allow an existing landfill to expand. *Id.* § 11-4-1520(F) (1994).

Petitioner Stony Island Reclamation Co. owns a 79-acre parcel of land in Chicago on which petitioner Land and Lakes operates a sanitary landfill. R. Vol. 8 at 1935. Land and Lakes had an operating permit from the City and from the Illinois Environmental Protection Agency (IEPA) allowing it to operate a sanitary landfill on a 53-acre portion of the site. R. Vol. 29, Pl. Ex. 10; R. Vol. 38, Def. Ex. 38. In 1982, Land and Lakes obtained a special use variance from the City's Zoning Board of Appeals under which a permitted use for the entire site is a sanitary landfill. R. Vol. 25, Pl. Ex. 3. Its zoning variance explicitly requires that the use of the site comply with all other applicable City ordinances. *Ibid.* In 1993, Land and Lakes obtained a supplemental permit from the IEPA allowing the operation of a landfill on the entire 79-acre site. R. Vol. 29, Pl. Ex. 49. This permit requires Land and Lakes to comply with all applicable local ordinances. *Ibid.*

In September 1993, Land and Lakes submitted a permit application to the City seeking an operating permit that would allow it to expand its 53-acre landfill to the full 79 acres. R. Vol. 26, Pl. Ex. 6. The City denied the permit on the basis that the moratorium ordinance prohibited the expansion of landfills. R. Vol. 29, Pl. Ex. 14. Land and Lakes then filed this suit seeking to declare the moratorium ordinance unconstitutional on a number of grounds, including substantive due process. Land and Lakes' complaint alleged that the moratorium ordinance denied it substantive due process because it was not rationally related to the purpose of protecting the health, safety, and welfare of the citizens of Chicago. R. Vol. 9 at 1935, p. 25. It also alleged that the moratorium constituted a taking of private property without just compensation in violation of the Fourteenth Amendment of the United States Constitution. *Id.* at p. 26.

A judge of the Circuit Court of Cook County, Illinois, held a hearing in this matter and granted Land and Lakes judgment on its declaratory judgment claim, its preemption claim under state law, its procedural due process claim and its substantive due process claim. Pet. App. A51.[1] Despite numerous factual findings, see *id.* at A36-46, the circuit court made no finding that the moratorium ordinance is not reasonably related to a legitimate government purpose. And in its discussion of the law, the circuit court did not discuss whether the moratorium ordinance violated substantive due process. See *id.* at

[1] Land and Lakes claims in its petition that it has spent $4 million on its landfill since the trial court's ruling in this case. See Pet. 5. This assertion is not supported by anything in the record. The record consists of documents and evidence that were before the trial court and, of course, contains no evidence of factual matters that occurred after the trial court issued its ruling. Moreover, Land and Lakes neglects to mention that it has continued to operate its expanded landfill and continues to do so to date. If it has expended money in order to operate its landfill, it has presumably done so because it continues to make a profit by operating the landfill.

A46-50. Nevertheless, the circuit court entered judgment for Land and Lakes on its claim that the moratorium ordinance violated substantive due process. See *id.* at A51. The circuit court issued a permanent injunction prohibiting the City from applying the moratorium ordinance to Land and Lakes and requiring the City to issue an operating permit to Land and Lakes for expansion of the landfill. See *ibid.*[2]

The Illinois Appellate Court held that the circuit court had erred on all counts on which it entered judgment for Land and Lakes and vacated the injunction issued by the circuit court. Pet. App. A29. As to Land and Lakes' claim that the moratorium ordinance violated its right to substantive due process, the court noted that when an ordinance, like the moratorium ordinance, does not implicate fundamental rights, substantive due process requires only that it bear a reasonable relationship to a proper legislative purpose and that it not be arbitrary or discriminatory. *Id.* at A17. The court then held that the moratorium ordinance was rationally related to public health and welfare because it regulated the dumping of waste within the City. *Id.* at A18. The court concluded that Land and Lakes had not shown that the moratorium ordinance was not rationally related to its legitimate purpose. *Ibid.* The appellate court remanded the matter to the circuit court for further proceedings consistent with its decision, noting that it expressed no opinion on the two counts, including a claim under the Takings Clause of the United States Constitution, that had been dismissed without prejudice, with leave to reinstate. *Id.* at 29-30. The Illinois Supreme Court denied Land and Lakes' petition for leave to appeal to that court. See *id.* at A55. Land and Lakes' takings clause claim has been reinstated

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[2] The circuit court also issued an order stating that there was no just reason for delaying appeal in this case. R. Vol. 14 at 3494. This finding provided the basis for an interlocutory appeal. See Ill. Sup. Ct. R. 304.

in the circuit court, where briefing of the issue has proceeded.

ARGUMENT

Land and Lakes' petition for a writ of certiorari should be dismissed for lack of jurisdiction because its federal takings claim remains pending in the Circuit Court of Cook County. Thus there is no final judgment over which this Court has jurisdiction under 28 U.S.C. § 1257(a).

Even aside from the jurisdictional problem, if the petition is not dismissed, it should be denied. This case is in an interlocutory posture and does not warrant review for that reason alone. Nor does it raise any substantial question for this Court's review. The City Council of the City of Chicago has enacted an ordinance placing a temporary moratorium on the issuance of operating permits for new and expanded landfills. In an unpublished order, the Illinois Appellate Court applied well settled principles of constitutional law to hold that the moratorium on operating permits does not violate substantive due process.[3] Land and Lakes argues that there is confusion over whether a heightened level of scrutiny applies to zoning ordinances that are challenged as violative of substantive due process. There is no such confusion, and even if there were, this case would not be the vehicle for resolving it. Land and Lakes did not argue for any form of heightened review below, and hence has waived such an argument. The precedents on which Land and Lakes relies, in any event, concern judicial review of zoning ordinances, and this ordinance placing a moratorium on the issuance of operating permits to new or expanded landfills is not a zoning ordinance. Thus, even if substantive due process required some form of heightened scrutiny for zoning ordinances, that principle would not apply here.

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[3] Under the Illinois Supreme Court Rules, such an order cannot be cited as precedent. *See* Ill. Sup. Ct. R. 23(e).

1. This Court lacks jurisdiction over Land and Lakes' petition for a writ of certiorari, and it should therefore be dismissed. Under 28 U.S.C. § 1257(a), this Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." As this Court recently reiterated, that section

> establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court."

Jefferson v. City of Tarrant, 118 S. Ct. 481, 485-86 (1997) (quoting *Market Street Railroad Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945)).

The decision in this case does not constitute a final judgment within the meaning of section 1257(a). The Illinois Appellate Court remanded the case to the circuit court, where Land and Lakes' takings claim under the federal Constitution remains pending, along with two state law claims. This is precisely the type of case this Court has described as one in which it does not have jurisdiction: a case where "the state courts have resolved some but not all of the petitioners' claims." *Jefferson*, 118 S. Ct. at 487. As in *Jefferson*, this Court's "jurisdiction therefore founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation." *Ibid.*

While this Court has recognized some limited exceptions to its final judgment rule, see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-83 (1975), it has described them as cases in which "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate review rather than delayed review

would be the best way to avoid 'the mischief of economic waste and of delayed justice.' " *Id.* at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Here, a federal question remains to be determined in additional proceedings in the Circuit Court of Cook County. The decision on that issue could require later review by this Court. Given that pending federal claim, this Court lacks jurisdiction at this time. Therefore, the petition for a writ of certiorari should be dismissed.

2. If the Court determines that it has jurisdiction, the petition should be denied. Even petitioners do not claim that the fact-bound question whether the Chicago moratorium on permits for new or expanded landfills is rationally related to a legitimate government interest merits this Court's review. They claim only that some degree of heightened judicial scrutiny is appropriate. They never argued below that the trial court had the authority to employ some heightened form of review to set aside the legislative judgment made by the Chicago City Council to place a moratorium on permits for new or expanded landfills. Nor did they obtain such a finding from the circuit court. This Court does not consider issues not properly presented to the state court that rendered the decision it has been asked to review. See *Adams v. Robinson*, 117 S. Ct. 1028, 1029 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). The interlocutory character of this case also argues against review. Petitioners' takings claim remains to be adjudicated. In fact one of the decisions of this Court on which petitioners rely, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), is a takings and not a substantive due process case, and even petitioners acknowledge that at least in some jurisdictions if they have a takings claim, they have no substantive due process claim. See Pet. 21-22. Thus, review at this juncture would be improvident.

3. The petitioners' claim that there is confusion over the correct standard of review of laws regulating land

use is inaccurate. This Court has not employed any heightened form of scrutiny for zoning or other land use regulations challenged as violative of substantive due process. Land and Lakes relies heavily upon this Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). There this Court stated that before a zoning regulation can be declared unconstitutional, it must be said that "such provisions are clearly arbitrary, unreasonable, having no substantial relation to the public health, morals, or general welfare." *Id.* at 395. It also explained that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. Thus, under *Euclid,* where it is fairly debatable whether a zoning classification has a substantial relation to public health, morals or welfare, the classification would pass scrutiny for due process concerns. Of course, if an ordinance must be upheld whenever its validity can be fairly debatable, then it need only be rational. This is no form of heightened scrutiny.

Indeed, this Court has more recently clarified the scope of review of a zoning classification when it does not infringe upon a protected liberty interest:

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.
> . . . .
>
> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (citations omitted). Nor has this Court reaffirmed a "heightened test" in other cases, as Land and Lakes claims. See Pet. 15. The cases Land and Lakes

cites do not support its contention. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), this Court rejected Exxon's due process claim because "we have no hesitancy in concluding that [the statute at issue] bears a reasonable relation to the State's legitimate purpose . . . ." *Id.* at 125. Land and Lakes also cites language in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), taken from *Nebbia v. New York*, 291 U.S. 502 (1934), as follows:

> [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained.

447 U.S. at 85 (quoting *Nebbia*, 291 U.S. at 525). But this Court in *PruneYard* plainly had no trouble concluding in one sentence that the regulation at issue was sufficiently related to the State's asserted interest without discussion of any factors associated with a heightened form of scrutiny. See 447 U.S. at 84.

For mysterious reasons, Land and Lakes also cites *Railway Express Agency v. New York*, 336 U.S. 106 (1949), for the proposition that this Court has applied a heightened standard of scrutiny to a substantive due process claim. See Pet. 15. In *Railway Express*, the Court considered a traffic regulation and stated:

> We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Id. at 109. This does not disclose that the Court subjected the ordinance at issue to any heightened form of scrutiny in that case.[4]

An examination of the decisions of lower courts cited by Land and Lakes shows that courts considering substantive due process challenges to zoning classifications are not confusing two standards, as Land and Lakes claims, see Pet. 18, but merely stating the same standard in different ways. This is amply illustrated by the results of the cases that Land and Lakes claims were decided under a heightened level of scrutiny. While Land and Lakes asserts that "there is little, if any, predictability in outcomes," *id.* at 4, in fact, these cases are remarkably predictable and consistent. Every case decided by a court of appeals that Land and Lakes claims applies a heightened level of scrutiny to a zoning classification nevertheless upheld the classification, and with minimal scrutiny at that. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996) ("The Federal Constitution does not empower courts to sit just to second-guess legislative judgments on technical matters like airport safety. The substantive due process claim fails."), cert. denied, 117 S. Ct. 2514 (1997); *Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996) (explaining that federal courts are not boards of zoning appeals; thus a plaintiff cannot state a claim that a zoning classification denies substantive due process unless he alleges a violation of some other substantive constitutional right or that available state remedies are inadequate); *Smithfield Concerned Citizens For Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (1st Cir. 1990) ("In

[4] Land and Lakes also incorrectly asserts that Justice Scalia has advocated the application of a higher level of scrutiny to claims that restrictions on property violate substantive due process. See Pet. 20. Justice Scalia, in fact, has written that "I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process." *United States v. Carlton*, 512 U.S. 26, 40 (1994) (Scalia, J., concurring) (emphasis in original) (citation omitted).

adjudicating substantive due process challenges to zoning ordinances, a court asks only whether a conceivable rational relationship exists between the zoning ordinance and legitimate governmental ends"); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 823 (10th Cir. 1988) (upholding the exclusion of churches from residential districts because the validity of the exclusion was "fairly debatable"), cert. denied, 490 U.S. 1005 (1989); *First Assembly of God v. City of Alexandria*, 739 F.2d 942, 944 (4th Cir.) (concluding in a one sentence discussion that the revocation of a special use variance was substantially related to concerns of traffic, road safety, fire prevention, and noise), cert. denied, 469 U.S. 1019 (1984). These cases demonstrate that there is no heightened scrutiny of zoning ordinances and certainly no unpredictability of outcome.

Land and Lakes also suggests that the Court should grant this petition to review two decisions of the Ninth Circuit. See Pet. 21-22. The Ninth Circuit, relying on *Albright v. Oliver*, 510 U.S. 266 (1994), and *Graham v. Connor*, 490 U.S. 386 (1989), has held that a substantive due process claim must be analyzed under the specific amendment to the Constitution that is the source of protection against the governmental action at issue; thus, claims involving property should be analyzed under the Takings Clause. See *Patel v. Penman*, 103 F.3d 868, 874-75 (9th Cir. 1996), cert. denied, 117 S. Ct. 1845 (1997); *Armendariz v. Penman*, 75 F.3d 1311, 1319-21 (9th Cir. 1996) (en banc). But this issue was never raised in this case by any party and was not decided by either the circuit court or the Illinois Appellate Court. And at most this would mean that petitioners' due process claim might be preempted by the Takings Clause, a result that would merely provide an alternate ground to affirm the judgment below. This case, therefore, does not present that issue for review.

4. Even if zoning classifications were subject to some form of heightened scrutiny when they are challenged as

violative of substantive due process, that test would not apply here. The moratorium ordinance is not a zoning ordinance. It does not prescribe or change any zoning classification in the City but applies to all property regardless of how it is zoned. The moratorium is a straightforward environmental control measure governing the operation of waste disposal sites located within the City of Chicago. The Chicago City Council has placed a temporary moratorium on the issuance of operating permits for new or expanded landfills located within the City because it has decided that the City—one of the most densely populated urban areas in the country—cannot accommodate and regulate the operation of new or expanded waste disposal sites. This decision was made to protect the health and safety of the City's citizens and the environment. The regulation of waste disposal serves significant governmental interests and should easily pass constitutional muster.

This ordinance, like the economic regulation considered by this Court in *Exxon Corp.*, 437 U.S. at 124-25, does not violate substantive due process if it bears a reasonable relation to a legitimate governmental purpose. The moratorium is directly related to protection of the environment and to protection of the health and safety of the citizens of the City of Chicago. New or expanded landfills disposing of waste within the City plainly pose an increased risk to health and safety of both citizens and the environment and require more regulation by the City. The Chicago City Council has decided that the City should not undertake such regulation at this time. The moratorium ordinance bears a rational—indeed, a substantial—relationship to a legitimate governmental purpose. The only other case of which we are aware in which a party challenged a moratorium on landfills under substantive due process reached that conclusion. See *Pro-Eco, Inc. v. Board of Commissioners*, 57 F.3d 505, 514 (7th Cir.), cert. denied, 116 S. Ct. 672 (1995). In that case, the Seventh Circuit held that "[c]oncern for

public health is a sufficient reason on its face to pass the *Euclid* test . . . ." *Id.*

Land and Lakes does not address the purpose of the moratorium. Instead, it claims that the ordinance does not have a proper legislative purpose because the City needs landfill space that Land and Lakes can provide because its property has a zoning variance and a State permit for a landfill. See Pet. 25.[5] Its argument amounts to no more than a claim that the City Council made a poor policy decision when it enacted the moratorium ordinance. This Court, however, has stated that even when a party has cast doubt on the wisdom of a statute, "it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to 'sit as a superlegislature to weigh the wisdom of legislation . . . .'" *Exxon Corp.*, 437 U.S. at 124 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)). The City Council did make a wise decision when it decided to limit landfills in one of the most densely populated urban areas in the country to those that already had operating permits; but even if it did not, courts should not second-guess its decision.

Land and Lakes also argues, see Pet. 24, as it has throughout this litigation, that the City has not proven that the moratorium is sufficiently related to its purpose. This, of course, misses the point. It is Land and Lakes that has the burden of proving that the moratorium is unreasonable. See, *e.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962). As the Illinois Appellate Court held, Pet. App. A18, Land and Lakes has not done so.

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[5] Land and Lakes seriously overstates the import of its state permit. As might be expected anytime state and local governments exercise dual regulatory control, that permit on its face requires Land and Lakes to comply with all local regulations. *See* R. Vol. 29, Pl. Ex. 49. The state permit is therefore completely irrelevant to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED

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CLERK

No. 97-1109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,

Respondents.

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Petitioners,

v.

CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION and THE LAKE MICHIGAN FEDERATION,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

BRIEF FOR RESPONDENTS, CITIZENS FOR A BETTER ENVIRONMENT, ET AL., IN OPPOSITION

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14 PP

QUESTION PRESENTED

Whether substantive due process requires the City of Chicago to issue an operating permit that would allow a landfill to expand when the City Council has enacted a municipal ordinance placing a moratorium on the issuance of operating permits for new or expanded sanitary waste landfills within the City.

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OPINIONS BELOW

The decision of the Illinois Appellate Court is unpublished. The decision of the Circuit Court of Cook County, Illinois is unpublished. The Illinois Supreme Court denied the Petitioners' Petition for Leave to Appeal and did not issue a decision.

JURISDICTION

This Court has no jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) because the highest court of Illinois has not yet rendered a final judgment within the meaning of section 1257(a). The Petitioners have a federal takings claim under the Fourteenth Amendment of the United States Constitution pending in the Circuit Court of Cook County.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, § 1.

ORDINANCE INVOLVED

The section of the Municipal Code of Chicago, Illinois, in effect at the time this case was litigated in the Circuit Court of Cook County provided, in pertinent part:

> Prior to February 1, 1996, notwithstanding any provision of this chapter: (1) no permit shall be issued nor modification of any permit allowed for the expansion of any existing sanitary landfill or

> liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal, and (2) no permit shall be issued for the creation or operation of a new sanitary landfill site or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal. Municipal Code of Chicago, Ill. § 11-4-1520(F) (1994).

This ordinance has since been renewed.

STATEMENT

Respondents, THE CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION, AND THE LAKE MICHIGAN FEDERATION (hereinafter collectively the "Public Interest Organizations"), adopt the statement of the nature of the case made by Respondents, THE CITY OF CHICAGO and HENRY L. HENDERSON. Further, the Public Interest Organizations state that they are local and regional not-for-profit community groups, all with members living on the south side of Chicago, working for the betterment of the environment in the area encompassing the Land and Lakes waste disposal facility. The Public Interest Organizations sought to intervene in the action on the side of the City of Chicago pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-408, because the Public Interest Organizations believed that their interests and the interests of their members are not adequately represented by the existing parties to this proceeding and because they and their members have unique interests which require separate

and independent presentation. Thus, the Public Interest Organizations submitted to the court an initial pleading seeking an injunction as a result of private injuries caused by a public nuisance in violation of the Chicago Municipal Code Section 11-4-1500, an injunction as a result of private injuries caused by a public nuisance in violation of Municipal Code Sections 11-4-250 and 11-4-1550, an injunction as a result of negligent operation of the landfill, and a declaratory judgment regarding Petitioners' constitutional challenge to the Ordinance and a declaratory judgment regarding the applicability of the moratorium to the site on which Petitioners were expanding.

In an order dated May 25, 1994, the Circuit Court denied the Public Interest Organizations' Petition to Intervene, stating that they did not have a unique interest in the litigation and were adequately represented by the City of Chicago.

On June 10, 1994, the Circuit Court denied the Public Interest Organizations' Motion to Reconsider and Motion for an Illinois Supreme Court Rule 304(a) finding that there is no just reason to delay appeal of the Court's order denying the Petition to Intervene. The Public Interest Organizations petitioned the Illinois Supreme Court for a Writ of Mandamus or, in the alternative, a Supervisory Order directing the Circuit Court to enter a Supreme Court Rule 304(a) ruling. The Illinois Supreme Court granted the Public Interest Organizations' Motion and entered a Supervisory Order directing the Circuit Court to enter a Supreme Court 304(a) finding on March 28, 1995.

On April 24, 1995, the Public Interest Organizations filed a Notice of Appeal from the order of the Circuit

Court denying them the right to intervene in the Land and Lakes action. Pursuant to Illinois Supreme Court Rule 301, the Public Interest Organizations also filed a Notice of Appeal from the Circuit Court's orders entering judgment in favor of Land and Lakes and against the City of Chicago on count I (declaratory judgment), count II (preemption), count IV (procedural due process) and count V (substantive due process) as parties who would be affected by these judgments. The Illinois Appellate Court consolidated the Appeals of the Public Interest Organizations and the City of Chicago on May 17, 1995.

On December 31, 1996, the Illinois Appellate Court entered an order and filed an opinion reversing the Circuit Court and vacating the injunction. However, it did not rule on the Public Interest Organizations' separate appeal regarding their right to intervene in the litigation. The Public Interest Organizations filed a Petition for Leave to Appeal the Appellate Court's decision on May 12, 1997. The Illinois Supreme Court denied the Petition for Leave to Appeal on October 1, 1997.

ARGUMENT

Petitioners' petition for writ of certiorari should be denied because this Court has no jurisdiction under 28 U.S.C. § 1257(a) to hear cases in which further proceedings are pending within the lower courts of the state. Section 1257(a) limits the Supreme Court's power to review state court judgments by writ of certiorari to final judgments or decrees rendered by the highest court of a state in which a decision may be had. Pursuant to this rule of finality, the Court has refused to hear cases

when "anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). This requirement that judgments be final prior to Supreme Court review is "an important factor in the smooth working of our federal system." *Id.* The requirement serves to avoid piecemeal federal court review of state court decisions and minimizes federal intrusions in state affairs. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). Because Petitioners' federal takings claim has been remanded by the Illinois Appellate Court and has been reinstated by the Circuit Court of Cook County where it is currently pending, the Court should deny this petition for certiorari until all issues pending before the Illinois courts are resolved.

While the Court has acknowledged that there are limited circumstances that may require departure from this traditional rule of finality, these circumstances are not present in this case. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975). The Court in *Cox* identified four categories of cases where it had departed from the traditional rule of finality to take jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. The Court specifically noted:

> [In] most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date. . . . [I]mmediate rather than delayed review would be the best way to avoid the mischief

> of economic waste and of delayed justice, . . . as well as precipitate interference with state litigation. *Cox Broadcasting Corp.*, 420 U.S. at 477-78 (citation omitted).

Because the Circuit Court of Cook County has reinstated the Petitioners' federal takings claim, this pending proceeding will require the decision of a federal question which may also require review by the Court at a later date. Thus, Petitioners' case is distinguished from the limited circumstances in which the Court has departed from the traditional rule of finality.

Moreover, the Petitioners' claim does not fit into any of the four categories of *Cox*. First, the substantive due process issue is not conclusive and the outcome of the lower court proceedings are not preordained. Although the Court has taken jurisdiction where the state court's decision on a federal issue rendered the decision on remand an inexorable certainty, this is not such a case. *See Cox Broadcasting Corp.*, 420 U.S. at 479. The Illinois Appellate Court's decision with respect to the due process claim in no way determines the outcome of the takings and estoppel claims in the trial court. Those issues will undergo an entirely different analysis from the due process claim, and indeed, the lower court will be free to disregard the appellate court's decision in arriving at its own decision on the takings and estoppel issues. Because the state court's decision on the federal issue in this case is not determinative of the other issues to be decided on remand, Petitioners do not meet the first exception to the rule of 28 U.S.C. § 1257.

The federal issue upon which the Petitioners base their petition for certiorari also does not fit into the second category of *Cox*, which allows the Court to hear the

case when the federal issue requires a decision regardless of the outcome of the state proceedings. The Court may hear a case when nothing could happen in the lower state court proceedings which would foreclose or make unnecessary a decision on the federal question. *See Radio Station WOW*, 326 U.S. 120; *see also Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (important purpose of final judgment rule is to prevent interference with state proceedings when underlying dispute may be otherwise resolved). In *Radio Station WOW*, the Court took jurisdiction over a decision that transferred ownership of a radio station and its properties to its original owner although additional state proceedings involving an accounting of profits had not yet occurred. The Court found that nothing could happen during the accounting proceedings which would foreclose or make unnecessary the federal decision, except settlement of the case. *Radio Station WOW*, 326 U.S. at 127. Because the federal issue would survive regardless of the outcome of the state court proceedings, the Court took jurisdiction so as to promote judicial economy and to avoid prolonged litigation.

Here, however, the Petitioners ultimately could prevail on either their state law claims or their federal takings claim such that a decision by this Court on their substantive due process claim would be unnecessary. If the Petitioners prevailed in the pending state court proceedings prior to any action by this Court on the due process claim, they may be satisfied by the relief granted and abandon their pursuit of relief based on their due process claim. Thus, to decide the federal issue at this time would waste judicial resources, because such a decision may never be necessary, and would further prolong an

already protracted litigation. Petitioners may petition for certiorari at a later time when the entire litigation has concluded and all federal issues have been decided.

Third, the Court will be able to review the federal issue at a later time. Under the third exception of *Cox*, the Supreme Court has jurisdiction if the federal issue will not survive the determination of the trial court and will have no other chance of coming before the Supreme Court. *Cox Broadcasting Corp.*, 420 U.S. at 481. In these cases, the decision of the trial court on remand will either render the federal issue moot or will otherwise preclude the ability of petitioners to seek review in this Court. *See North Dakota State Board of Pharmacy*, 414 U.S. 156. Such is not the case here. The due process issue will survive the decision of the trial court on the takings and estoppel issues. If Petitioners lose in the trial court on the takings and state law claims, Petitioners may then request certiorari in this Court, consolidating both the due process and the takings issues in a single petition and thereby conserving this Court's resources. If Petitioners prevail in the trial court, Petitioners may still seek review of the due process issue. This case therefore does not warrant certiorari under the third exception enumerated in *Cox*.

Finally, this Court's refusal to review the federal issue would not seriously erode federal policy; thus, the fourth and final category of cases enumerated in *Cox* also does not apply. *See Cox Broadcasting Corp.*, 420 U.S. at 483. When the state court has finally decided the federal issue before the Court and when, at the same time, it remains possible for the claimant to prevail in the state court on nonfederal grounds, review by the Court is unnecessary because the ongoing state court proceedings

may obviate the Court's decision. However, in certain circumstances, the Court nevertheless will entertain the case because by doing so it could prevent serious erosion of federal policy by reversing the state interpretation of the federal issue and precluding all further litigation. In these rare cases, most notably where First Amendment issues are at stake, the Court has taken jurisdiction despite ongoing state court proceedings.

Such a scenario is not present in the instant proceeding. Here, the substantive due process issue involves no protected right upon which the Court has granted heightened scrutiny. Instead, this case involves the power of a municipal corporation to regulate a waste disposal site within its borders. There is no significant federal policy that would be seriously eroded by allowing the City of Chicago to regulate waste disposal within its borders. Rather, substantive due process, with the exception of the few protected rights not implicated here, provides only that a government action be rationally related to a legitimate governmental purpose. In effect, any substantive due process "federal policy" regarding land use regulations merely provides Petitioners with a limited protection from arbitrary and unreasonable government action. Given the limited protection provided by substantive due process, this case does not risk an erosion of federal policy if this Court declines to review the case.

CONCLUSION

The requirement of a final judgment in the highest state court is a fundamental rule of Supreme Court jurisdiction. Requiring Petitioners to observe this rule will

result in no prejudice to the Petitioners. Petitioners are not being forced to suffer a hollow exercise in appellate procedure. On the contrary, they currently have a claim they wish to have heard in the Circuit Court of Cook County and, therefore, should wait for the trial court's decision on that claim before seeking review in this Court of another claim. Petitioners have asked the Court to do precisely what 28 U.S.C. § 1257 prohibits: piecemeal review of the federal issues involved in a particular case.

The petition for a writ of certiorari therefore should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-1109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Respondents argue for the denial of Land and Lakes' Petition for Certiorari on four grounds: (1) that this Court lacks jurisdiction of the questions presented; (2) that Land and Lakes did not argue for a heightened level of scrutiny for land use cases under substantive due process in the trial court, and therefore waived that argument to this Court; (3) that the "substantial relation" test and the "rational relation" test are really the same test, just stated differently; and (4) that even if there is a heightened level of scrutiny, that test only applies to zoning cases, and the City's landfill moratorium ordinance is not a zoning ordinance. For the reasons set forth herein, this Court should reject the Respondents' arguments.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT LAND AND LAKES' PETITION FOR WRIT OF CERTIORARI

Respondents' argument that this Court lacks jurisdiction because a takings claim is pending in the Illinois trial court is unsupported in the law. This Court should reject the Respondents' argument for two equal, but separately compelling reasons. First, this case fits into the third exception for final judgments as enunciated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Second, since time is critical in this matter, the issues presented are ripe for this Court's review.[1]

Petitioners Land and Lakes Company and Stony Island Reclamation Co. ("Land and Lakes") have properly invoked this Court's jurisdiction under 28 U.S.C. §1257. There exist at least four categories of cases where a decision on a federal issue has been treated as a final judgment for purposes of §1257, and where this Court has assumed jurisdiction over the case without waiting for the completion of additional proceedings pending in the lower state courts. *Cox*

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[1] Citizens For a Better Environment is not a party in this case and accordingly its Brief in Opposition should be stricken. For the reasons contained herein, the Citizens' jurisdictional argument also has no merit.

Broadcasting Corp., 420 U.S. at 477. The third category under *Cox* is comprised of those cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In these cases, if the party asking for interim review ultimately wins on the merits, the federal issue will be mooted. *Id.*; *see also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

This case falls within the third category of cases enumerated in *Cox*. The trial court entered judgment for Land and Lakes on its declaratory judgment, preemption, procedural due process, and substantive due process counts contained in its Verified Complaint. The trial court dismissed Land and Lakes' estoppel and takings claims without prejudice, with leave to reinstate if necessary. Pursuant to Illinois Supreme Court Rule 304(a)[2] and *at Respondents' request*, the trial court certified that its decision as to Land and Lakes' due process claim was a "final judgment," and that there was no just reason for Respondents to delay in appealing the court's decision.[3]

The issues were fully briefed before the Illinois Appellate Court, and that court entered an order on Land and Lakes' substantive due process claim and the other claims before it. Further, the Illinois Appellate Court ordered the case remanded to the trial court to

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[2] Illinois Supreme Court Rules 306, 307 and 308 provide the means to appeal interlocutory orders. Illinois Supreme Court Rule 304, however, requires an express written finding by the trial court that its decision is a "final judgment" as to one or more but fewer than all of the claims involved in the case. Ill. S. Ct. R. 304(a). Thus, the trial court, at the City's own request, declared its decision on Land and Lakes' due process claim a "final judgment" and therefore appealable.

[3] Now that the Respondents have obtained a favorable ruling in the appellate court, they argue that there has been no final judgment because there is a pending federal takings claim in the trial court. This argument is inherently inconsistent with the position they have taken in the Illinois courts; namely, that the appellate court's decision is a final order and that they will seek a mandate from the appellate court to compel Land and Lakes to cease using its additional landfill acreage.

resolve any remaining issues.[4] The Illinois Supreme Court subsequently denied Land and Lakes' petition for leave to appeal. Thus, any inquiry into Land and Lakes' substantive due process claim is over as far as the Illinois courts are concerned, and the Illinois Appellate Court's determination as to the Petitioners' due process claim is law of the case. *See, e.g., Foster v. Kanuri*, 288 Ill. App. 3d 796, 681 N.E.2d 111 (1st Dist. 1997).

Respondents' argument that Land and Lakes may later seek review of the due process issue following determination of the claims pending in the trial court is simply incorrect. Regardless of whether Land and Lakes or Respondents appeal the trial court's determination as to Land and Lakes' remaining takings, estoppel and breach of contract claims, the only issues which would still be appealable to the Illinois Appellate and Supreme Courts would be issues relating to the remaining claims. Neither the Illinois Appellate Court nor the Illinois Supreme Court would consider Land and Lakes' substantive due process claim again, or any issue already decided by the Appellate Court's December 31, 1996 Opinion and Order. *Id.* This Court, in turn, would not have jurisdiction to hear Land and Lakes' substantive due process claim at a later date. Therefore, if there is to be a review of Land and Lakes' substantive due process claim by this Court, it is now or never. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163-64 (1973). *See also Hudson Distributors, Inc. v. Eli Lilly & Co., Inc.*, 377 U.S. 386, 389 (1964) (holding the existence of separate and unresolved federal issues pending in a state trial court does not render a judgment of a State's highest court nonfinal or unappealable within 28 U.S.C. § 1257).

This Court also has asserted jurisdiction over decisions of a lower court where time was a critical factor. *See, e.g., National Socialist*

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[4] Land and Lakes' takings claim was reinstated in the trial court *after* the Illinois Appellate Court rendered its decision, but *before* Land and Lakes filed its petition for leave to appeal to the Illinois Supreme Court. The Respondents *never* raised in its response to Land and Lakes' petition any issue relating to Land and Lakes' right to seek review by the Illinois Supreme Court, or as to the non-finality of the its claims due to the reinstated takings and estoppel claim.

Party of America v. Village of Skokie, 432 U.S. 43 (1977); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). Here, time is in fact critical. Respondents have consistently asked that the Illinois Appellate Court issue its mandate immediately, at which time the City would move to revoke Land and Lakes' City operating permit. If successful, the City's action would effectively end Land and Lakes' business. Land and Lakes' ability to stay in business, therefore, is a private interest at stake that could be "irremediably lost." *See Hudson*, 377 U.S. at 399 (J. Harlan, dissenting). Under these circumstances, it makes little sense for Land and Lakes' substantive due process claims to lie in wait until the trial court makes its determination as to Land and Lakes' remaining claims. Such a determination could take a considerable amount of time, which Land and Lakes, with its livelihood at stake, cannot afford. Thus, time is of the essence, and this Court should invoke its jurisdiction.[5]

For the foregoing reasons, Land and Lakes respectfully requests that this Court find the Illinois Appellate Court's decision and the Illinois Supreme Court's denial of review final for purposes of 28 U.S.C. §1257, and consider Land and Lakes' Petition on the merits.

II. LAND AND LAKES PROPERLY PRESENTED ITS SUBSTANTIVE DUE PROCESS CLAIM AT ALL STAGES OF THE LITIGATION BELOW

The City erroneously claims that Land and Lakes failed to preserve its substantive due process claim in the Illinois courts. The City's argument is belied by the record. Land and Lakes properly presented its substantive due process claim at all stages of the litigation below. Land and Lakes successfully asserted its substantive due process claim at trial, and the trial court ordered that the City immediately issue an operating permit to Land and Lakes for the 122nd Street Facility. (App. at A51.) When the City appealed

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[5] If, however, the City agrees to stay the mandate pending resolution of Land and Lakes' remaining claims in the Illinois courts, Land and Lakes has no objection to staying its Petition for Writ of Certiorari until such time as the remaining issues are resolved, so that all issues may be presented to this Court at one time.

that decision, Land and Lakes argued for a heightened level of scrutiny for its substantive due process claim in its Illinois Appellate Court brief. Specifically, Land and Lakes argued that the moratorium did not substantially advance any recognized public interest, as follows:

> In the area of land use regulation, substantive due process requires that the municipality employ a means to achieve a legislative goal which substantially advances the legislative purpose. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Northern Trust Co. v. City of Chicago*, 4 Ill. 2d 432, 438, 123 N.E. 330 (1954).

(Brief of Plaintiffs-Appellees at p. 33.) The Illinois Appellate Court erroneously applied a "rational relation" test and reversed the trial court's ruling on Land and Lakes' substantive due process claim.

In its Petition for Rehearing of the Appellate Court's ruling, Land and Lakes *again* argued that a higher level of scrutiny applied to land use cases. Specifically, Land and Lakes stated:

> The Court also failed to apply the proper legal standard to evaluate Land and Lakes' substantive due process claim. . . . Both the United State Supreme Court and the Illinois courts have recognized that a higher level of scrutiny is required in the area of land-use regulation when examining the constitutionality of an ordinance *as applied* to a certain piece of property. In such a case, substantive due process demands that the municipality employ a means which *substantially advances* the legislative purpose of the municipality. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Northern Trust Co. v. City of Chicago*, 4 Ill.2d 432, 438, 123 N.E. 330 (1954).

(Land and Lakes' Petition for Rehearing at page 15).

Land and Lakes argued for a third time, on page 18 of its Petition for Leave to Appeal to the Illinois Supreme Court, that the heightened land use test should apply to its substantive due process claim, as follows:

> Land and Lakes also seeks this Court's review because the Appellate Court failed to apply the proper legal standard to evaluate Land and Lakes' substantive due process claim. . . . Both the United States Supreme Court and the Illinois Courts

> have recognized that a higher level of scrutiny is required in the area of land-use regulation when examining whether the ordinance is constitutional *as applied* to a certain piece of property. In such a case, substantive due process demands that the municipality employ means which *substantially advances* the legislature purpose of the municipality. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Northern Trust Co. v. City of Chicago*, 4 Ill. 2d 432, 438 123 N.E.2d 330 (1954).

Contrary to the City's suggestion, under Illinois law, an appellee may argue any point in support of its judgment on appeal, so long as the factual basis was before the trial court. *Jackson v. Chicago Bd. of Ed.*, 192 Ill. App. 3d 1093, 549 N.E.2d 829 (1st Dist. 1989) (citing *Shaw v. Lorenz*, 42 Ill. 2d 246, 246 N.E.2d 285 (1969)). Here, Land and Lakes did just that. It prevailed in its substantive due process count in the trial court, and then defended that court's favorable ruling by arguing to the Illinois Appellate Court and to the Illinois Supreme Court that under substantive due process, a land use regulation or ordinance is subject to a higher standard of review. Having properly and consistently presented this issue in the Illinois state courts, Land and Lakes has preserved this issue for appeal, and this Court should properly consider it on a petition for writ of certiorari.

III. LAND AND LAKES' PETITION SHOULD BE GRANTED TO CLARIFY WHETHER THERE IS ONE STANDARD, TWO STANDARDS, OR THE SAME STANDARD USING "DIFFERENT WORDS" TO ANALYZE LAND USE CASES UNDER DUE PROCESS CHALLENGES

The City acknowledges in its Brief in Opposition that this Court, and Circuit Courts around the country, have set forth a substantive due process test in the land use area which requires that a challenged regulation or ordinance bear a "substantial relation" to the objective sought to be obtained. (City's Brief in Opp. at 9-10.)[6] The

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[6] The City recognized in its brief that both *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (citing to *Railway Express Agency v. New York*, 336 U.S. 106

(continued...)

City claims, however, that this test and the "rational relation" test are one in the same, just articulated by the courts in "different ways." (City's Brief in Opp. at 11.) The City's argument demonstrates precisely why this Court should grant Land and Lakes' Petition—there is significant confusion regarding the substantive due process test to be applied to a regulation or ordinance in the land use area.

Because the reviewing courts, including the Illinois Appellate Court in this case, are unclear as to whether there is one test or two, or whether a "substantial relation" is different from a "rational relation," this Court should clarify the standard upon which land use regulations should be examined under the due process clause of the Constitution, and end the confusion. In its Petition, Land and Lakes noted that both the United States Supreme Court and various Circuit Courts are using both the "substantial relation" and the "rational relation" test to examine land use regulations in a substantive due process context. Still other courts confuse these tests, borrowing terms from both standards. Contrary to the City's statement in its Brief in Opposition, it is impossible to discern which standard these courts are applying when deciding the cases. Moreover, the courts themselves are confused, as demonstrated by the Sixth Circuit's statement:

> The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable . . . We wish it were in our power to harmonize these decisions, but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.

Pearson v. City of Grand Blanc, 961 F.2d 1211, 1219 n. 45 (6th Cir. 1992). Because this case presents the opportunity for the Supreme Court to bring harmony to the inherently inconsistent standards (or at the very least language) currently applied by the Circuits

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[6] (...continued)
(1949) and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)) required that the regulation or ordinance at issue bear a "substantial relation" to the objective sought to be obtained.

and the lower courts, this Court should grant Land and Lakes' petition for writ of certiorari.

IV. THE CITY HAS ATTEMPTED TO DENY LAND AND LAKES ITS PROPER ZONING UNDER THE GUISE OF AN UNCONSTITUTIONAL "ENVIRONMENTAL" ORDINANCE

Finally, the City argues that even if there is a heightened level of scrutiny for land use cases, this case involves an environmental regulation rather than zoning and therefore, the heightened level of scrutiny does not apply to the City's landfill moratorium ordinance.[7] The City's argument is based on circular reasoning and should be rejected. The City has improperly attempted to use the landfill moratorium ordinance to deprive Land and Lakes of the right to use the landfill pursuant to its duly authorized zoning.

The City argues in its Brief in Opposition that the landfill moratorium ordinance is a "straight-forward environmental control measure." (City's Brief in Opp. at p. 13). The City admits, however, that Land and Lakes has a valid Illinois Environmental Protection Agency ("IEPA") operating permit. (City's Brief in Opp. at p. 3). Under Illinois law the City can regulate environmental matters only to the extent that its regulations remain consistent with State standards. *See County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979) (holding that home rule units could regulate landfills through zoning ordinances, but such ordinances must conform to uniform standards established by the State).[8] Here,

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[7] As set forth in Land and Lakes' Petition, the City's landfill moratorium ordinance is not "temporary" as the City would have this Court believe; rather, the ordinance has been continuously renewed (with the exception of one 8-day period) from 1984 until the year 2000. (City's Brief in Opp. at p. 3). By enacting such an ordinance for 16 years, the City has made a *policy decision* for the *prohibition* against new or expanding landfills in the City of Chicago.

[8] The City argues that Land and Lakes' IEPA operating permit on its face requires compliance with all local regulations. Under *Sexton*, however, the City can require no more than that of the State. The City's moratorium ordinance cannot, therefore, nullify the very IEPA permit which authorizes Land and Lakes to operate its landfill facility.

the State of Illinois already has determined that use of the entire 122nd Street Facility as a landfill is environmentally safe to the public health, safety and welfare.[9] Under *Sexton*, the City can only replicate these same environmental standards. Thus, because the moratorium ordinance fails to replicate these environmental standards, and in fact attempts to nullify them, the moratorium ordinance is not a proper "environmental control measure," as the City contends.

The City's landfill moratorium ordinance is, in fact, an attempt by the City to rescind the zoning of Land and Lakes' 122nd Street Facility without the City having to go through the proper zoning process.[10] Indeed, even the Illinois Appellate Court recognized that the City's landfill moratorium ordinance was analogous to a zoning ordinance, and analyzed it as such. (App. at A17.) Had the City gone through the proper channels to attempt to change the zoning of the landfill, it would nevertheless have had to allow Land and Lakes to operate its entire 122nd Street Facility under the "prior non-conforming use" doctrine.[11] Yet, the City's landfill moratorium would prohibit Land and Lakes from operating the entire landfill,

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[9] Moreover, the City does not claim that the Land and Lakes' facility is a threat to the public health, safety or welfare. The trial court, in fact, found that the 122nd Street Facility was protective of the public health, safety and welfare. (App. at A38.)

[10] In 1982, two years *before* the enactment of the moratorium ordinance, Land and Lakes had been granted, by the City's own Zoning Board of Appeals ("ZBA"), a special use variance for the 27 acres of its landfill facility at issue in this case. In granting Land and Lakes a special use variance, the ZBA noted that Land and Lakes' proposed use of the 27 acres as a sanitary landfill would benefit the City in a variety of ways, including that it would serve the continuing public need for sanitary landfills, that it would complement land usage in the area, that the proposed use would eliminate the public health nuisances that had previously prevailed at the site before Petitioners purchased the facility, and that operation of a sanitary landfill would protect the public health, safety and welfare.

[11] *See, e.g.*, Municipal Code of Chicago, Ill. § 17-24-010 *et seq.* This doctrine is used to avoid situations such as the one before this Court where a prior use has been eliminated by a municipality's actions, in violation of substantive due process.

despite Land and Lakes having a valid special use variance and IEPA operating permit to do so, which determined respectively that the siting was appropriate and that Land and Lakes met all the environmental criteria for operation of its landfill.[12]

In the alternative, the City's attempt to deny Land and Lakes the fruits of its zoning, without granting Land and Lakes the right to continue to operate consistent with its prior use, is a clear violation of Land and Lakes' substantive due process rights even under a "rational relation" test. For all of these reasons, this Court should grant Land and Lakes' Petition.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

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[12] Land and Lakes had the necessary permits and zoning to operate its entire 122nd Street Facility as a sanitary landfill prior to the enactment, and subsequent renewals, of the landfill moratorium ordinance. The trial court also determined that Land and Lakes had a right to a City operating permit during an 8-day period of time when the landfill moratorium ordinance lapsed in 1994. (App. at A45.)